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The Law Commission

Working Paper No. 115

Corroboration of Evidence in Criminal Trials

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This working paper, completed on 6 March 1990, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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NOTE: From 6 May, the prefix is '071' instead of '01'.

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Working Paper No. 115

Corroboration of Evidence in Criminal Trials

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THE LAW COMMISSION

WORKING PAPER NO. 115

CORROBORATION OF EVIDENCE IN CRIMINAL TRIALS

TABLE OF CONTENTS

	Paragraphs	Page
PART I - INTRODUCTION	1.1-1.5	1
PART II - AN OUTLINE OF THE PRESENT LAW	2.1-2.37	4
A. The cases to which the corroboration rules apply	2.1-2.7	4
1. Introduction	2.1-2.4	4
2. Cases governed by statute	2.5-2.7	6
(a) Speeding	2.5	6
(b) Perjury	2.6	7
(c) Procuration offences under the Sexual Offences Act 1956	2.7	7
3. Cases in which a corroboration warning must be given	2.8-2.14	8
(a) Introduction	2.8-2.9	8
(b) Sexual offences	2.10-2.11	9
(c) Accomplices	2.12-2.14	11
B. Evidence capable of constituting corroboration	2.15-2.27	13
1. Introduction	2.15-2.18	13
2. Corroborative evidence must be independent	2.19	15
3. Corroborative evidence must implicate the accused	2.20-2.21	16
4. Accomplices cannot corroborate one another	2.22	18

195915 A2

	Paragraphs	Page
5. Corroboration by the accused	2.23-2.24	1
(a) General	2.23	1
(b) Section 62 of the Police and Criminal Evidence Act 1984	2.24	2
6. The "similar fact" principle	2.25-2.26	2
7. Corroborative evidence may be cumulative	2.27	2
C. Procedure	2.28-2.32	2
1. Judge and jury	2.28-2.30	2
2. Appeals	2.31	2
3. Summary trials	2.32	2
D. Suspect witnesses to whom the corroboration rules do not apply	2.33-2.37	2
PART III - PREVIOUS REVIEWS OF THE SUBJECT	3.1-3.14	3
A. Introduction	3.1	3
B. The Eleventh Report of the Criminal Law Revision Committee (1972)	3.2-3.3	3
C. The Report of the Devlin Committee (1976)	3.4-3.7	3
D. Perjury: The Criminal Law Revision Committee and the Law Commission	3.8-3.12	3
1. The present law	3.8-3.9	3
2. The recommendations of the Criminal Law Revision Committee	3.10	3
3. The Law Commission's recommendations	3.11-3.12	4
E. The Report of the Home Office Advisory Group on Video Evidence	3.13-3.14	4

	Paragraphs	Page
PART IV - PROVISIONAL PROPOSALS FOR REFORM	4.1-4.43	43
A. Introduction	4.1	43
B. Statutory corroboration requirements	4.2-4.4	43
C. Our criticisms of the common law corroboration rules	4.5-4.41	45
1. Introduction	4.5-4.10	45
2. The rigidity of the corroboration rules	4.11-4.14	47
3. The complexity of the corroboration rules	4.15-4.17	49
4. The corroboration rules produce anomalies	4.18-4.22	51
5. The corroboration rules may operate to the detriment of the accused	4.23-4.24	54
6. The categories of evidence to which the corroboration rules apply	4.25-4.38	55
(a) Accomplices	4.26-4.30	55
(i) The origins of the rule	4.26	55
(ii) The views of the CLRC	4.27-4.29	55
(iii) Our conclusion	4.30	56
(b) Sexual offences	4.31-4.38	57
(i) The views of the CLRC	4.31-4.33	57
(ii) The recommendation of the Advisory Group on Video Evidence	4.34	59
(iii) Other considerations	4.35-4.38	60
7. Our conclusion	4.39-4.41	62
D. Our provisional proposals	4.42-4.43	63

	Paragraphs	Page
PART V - SHOULD THERE BE RULES RELATING TO PARTICULAR CATEGORIES OF EVIDENCE?	5.1-5.30	65
A. Introduction	5.1-5.2	65
B. Abolition without replacement	5.3-5.8	65
C. Possible legislative rules	5.9-5.24	68
D. Should a warning be prohibited in certain cases?	5.25-5.29	76
E. Procedure in Magistrates' Courts	5.30	79
PART VI - SUMMARY OF PROVISIONAL PROPOSALS AND MATTERS ON WHICH COMMENT IS INVITED	6.1-6.5	80
APPENDIX A: THE ORIGINS OF THE COMMON LAW CORROBORATION RULES		84
Part 1: Accomplices	1-8	84
Part 2: Complainants in Sexual Offences	9-17	88
APPENDIX B: CORROBORATION IN CRIMINAL TRIALS: A COMPARATIVE STUDY		94
Introduction	1.1-1.2	94
Canada	2.1-2.16	94
The Canadian Law Reform Commission recommendations in 1975	2.2-2.3	95
The Task Force recommendations in 1982	2.4-2.5	95
The current Canadian law	2.6-2.16	97
(a) Statutory requirements of corroboration	2.6-2.7	97
(b) The common law mandatory warning	2.8-2.12	98

	Paragraphs	Page
(i) The evidence of complainants in sexual offences	2.8	98
(ii) Accomplice testimony	2.9-2.11	98
(iii) The sworn evidence of children	2.12	100
The nature of corroborative evidence	2.13-2.16	100
Australia	3.1-3.13	102
Introduction	3.1	102
Corroboration as a statutory requirement	3.2-3.7	103
(a) Treason and sedition	3.2-3.3	103
(b) Perjury	3.4	104
(c) Bigamy	3.5	104
(d) The unsworn evidence of children	3.6-3.7	104
The mandatory corroboration warning	3.8-3.10	105
(a) Accomplices	3.8	105
(b) Complainants in sexual cases	3.9	106
(c) The sworn evidence of children	3.10	107
The Australian Law Reform Commission proposals	3.11-3.13	107
New Zealand	4.1-4.7	110
Introduction	4.1	110
Sexual offences	4.2-4.3	110
Accomplices	4.4	111
Witnesses with a purpose of their own to serve	4.5	112
Children's evidence	4.6	112
Statutory corroboration requirements in trials for treason or perjury	4.7	113

	Paragraphs	Page
United States of America	5.1-5.21	11
Introduction	5.1	11
Corroboration rules applying to categories of witness	5.2-5.9	11
(a) Accomplices	5.2-5.3	11
(b) Complainants in sexual offences	5.4-5.8	11
(c) Children	5.9	11
Corroboration rules applying to categories of evidence	5.10-5.11	11
(a) Confession by the defendant	5.10	11
(b) Eye witness identification evidence	5.11	11
Corroboration required for conviction of certain offences	5.12-5.14	12
(a) Treason	5.12	12
(b) Perjury	5.13	12
(c) Miscellaneous offences	5.14	12
The Model Penal Code	5.15-5.21	12
(a) Sexual offences	5.16-5.19	12
(b) Perjury	5.20	12
(c) Other offences	5.21	12
Scotland	6.1-6.2	12

APPENDIX C: EXTRACT FROM THE REPORT DATED DECEMBER 1989 OF THE ADVISORY GROUP (CHAIRMAN: HIS HONOUR JUDGE PIGOT QC, COMMON SERJEANT OF LONDON) ON THE ADMISSIBILITY OF VIDEO-RECORDED EVIDENCE BY CHILDREN AND OTHER VULNERABLE WITNESSES IN CRIMINAL PROCEEDINGS 12

SUMMARY

In this working paper the Law Commission reviews the rules requiring corroboration of the testimony given in criminal trials by certain categories of witness. The Law Commission provisionally proposes the abolition of the common law corroboration rules and certain of those imposed by statute, and goes on to invite views on whether any, and if so what, new rules should replace them. The working paper includes a survey of the position in several other jurisdictions.

PART I

INTRODUCTION

1.1 On 7 November 1988 the Lord Chancellor made a reference to the Commission in the following terms -

> "To review the law concerning the corroboration of evidence in criminal proceedings and to make recommendations."

1.2 We think it important to make clear at the outset the ground that we cover in this reference and, thus, in this working paper. On occasion, the term "corroboration" is used loosely, as signifying simply evidence of any kind that may tend to support the testimony of any witness in any type of case. We are not concerned in this working paper with "corroboration" of this kind, but with the law of corroboration in its "legal" sense - that is, with the detailed rules relating to (i) the need for certain categories of testimony tendered for the prosecution to be corroborated; and (ii) the evidence that is and is not capable of meeting that requirement. Thus, the exercise does not extend to the rules of practice, the Turnbull guidelines,[1] which apply to cases where a court is called upon to evaluate identification evidence. This is because, although in some of those cases questions may arise concerning evidence which supports the testimony of a witness on an issue of identity, Turnbull does not provide for a corroboration requirement.

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1. [1977] QB 224 (CA); see para. 3.7 below.

1.3 Somewhat similarly, discussion of the conditions under which confession evidence is reliable often makes reference to the desirability of such evidence being "corroborated". However, such observations relate not to corroboration of testimony given in court by a prosecution witness, which is our concern, but to the more specific question of whether it should be possible to convict solely on the strength of a confession made by the accused before the trial. The issues to which this question gives rise involve consideration of the general reliability of confession evidence and of the conditions on which it should be admitted, including, in particular, whether it should be possible to convict where the only evidence is a confession. These issues are quite different from those raised by the rules regulating corroboration in the legal sense. We therefore do not address the question.[2]

1.4 Our approach is as follows. Part II of this working paper comprises an outline of the present law. In Part III we consider previous reviews of this topic, or of particular aspects of it. In Part IV we make provisional proposals for reform of the law; and in Part V we set out a number of questions, arising from earlier Parts of the paper, on which we specifically invite comment. Our conclusions and provisional proposals, together with the matters on which we seek comment, are summarised in Part VI.

1.5 There are three Appendices to the paper. Appendix A, which is in two parts, contains accounts of the origin of the common law corroboration rules relating

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2. We note that the Inquiry into the circumstances surrounding the convictions arising out of bomb attacks in Guildford and Woolwich in 1974, which was instituted in October 1989 under the Chairmanship of the Right Honourable Sir John May, is to consider the conditions under which confession evidence was admitted in those cases.

respectively to the evidence of accomplices and to that of complainants in trials for sexual offences. Appendix B is a comparative study: it considers the law relating to corroboration in Canada, Australia, New Zealand, the United States and Scotland, and includes an account of proposals for reform that have been made in some of those jurisdictions. Appendix C contains an extract from the Report of the Home Office Advisory Group on Video Evidence.[3]

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3. Published in December 1989. See paras. 3.13-3.14 below.

PART II

AN OUTLINE OF THE PRESENT LAW

A. THE CASES TO WHICH THE CORROBORATION RULES APPLY

1. Introduction

2.1 In general, what matters in an English criminal trial is the quality, rather than the quantity, of evidence. Thus, on the one hand, there is no rule which prevents a jury from convicting on the unsupported testimony of a single prosecution witness,[1] even if it is contradicted by several witnesses for the defence; and, on the other hand, the jury need not believe a witness's testimony, even if it is not contradicted by other evidence and is unshaken in cross-examination. "If [a] witness, from want of intelligence, or from any other cause, is incompetent under the rules of law, the Court will not permit him to testify; but when the evidence of the witness is before the jury, all questions of credibility are for them, and for them alone."[2]

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1. Hester [1973] AC 296, 315 (per Lord Morris of Borth-y-Gest). "The agreement of witnesses on matters of detail is often of the greatest significance, but, if it were invariably required, the testimony of one honourable man could not, as Napoleon observed, prove a single rascal guilty, though the testimony of two rascals could prove an honourable man guilty": Cross on Evidence, 6th ed. (1985), p. 208 (citing Wigmore on Evidence , vol. IX, p. 256, n. 3).

2. Beck J, in Callahan v. Shaw , 24 Ia. 441, 444, cited in Wigmore on Evidence, vol. VII, 3rd ed (1940), p. 261, para. 2034(3). (Emphasis added.) Wigmore states, of the principle that the testimony of a single witness may legally suffice as evidence upon which the jury may found a verdict, that the fact that in England the principle has rarely been mentioned does not affect its actual acceptance: op. cit., p. 259, para. 2034, n. 2.

2.2 There are, however, certain categories of evidence to which, by way of exception to the general rule, corroboration rules apply. The rules operate only in favour of the accused, who can always be acquitted on the strength of uncorroborated evidence, even where he bears a burden of proof (whether persuasive or evidential).

2.3 In most cases the question of corroboration is governed by common law rules, under which there is no requirement of corroboration. In such cases the judge is required to warn the jury that it is dangerous to convict on the uncorroborated evidence of certain categories of witness and to explain why; but he should then go on to direct the jury that if, after heeding the warning, they conclude that the witness is speaking the truth, they are entitled to convict.[3] In this paper we are principally concerned with those cases.

2.4 In a few instances, however, statutory provisions have amended the general rule referred to in paragraph 2.1 above, by requiring the presence of corroboration before a conviction can be obtained. We briefly refer to those cases in the next section.

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3. In Henry (1968) 53 Cr App R 150, 153-4 (CA), Salmon LJ explained that, after giving the warning, the judge -

> "should then go on to tell the jury that, bearing that warning well in mind, they have to look at the particular facts of the particular case and if, having given full weight to the warning, they come to the conclusion that the [witness] without any real doubt is speaking the truth, then the fact that there is no corroboration matters not at all; they are entitled to convict."

2. Cases governed by statute[4]

(a) Speeding

2.5 Under section 89(2) of the Road Traffic Regulation Act 1984, a person cannot be convicted of speeding "solely on the evidence of one witness to the effect that, in the opinion of the witness, the person prosecuted was driving the vehicle at a speed exceeding a specified limit".[5] This provision is aimed only at preventing a conviction on the unaided opinion of a single witness as to the speed at which the defendant was driving. It does not require that the evidence of a witness in a trial for a speeding offence must always be corroborated: there may be a conviction on the evidence of one witness if it amounts to something more than his opinion.[6] Nor does the subsection preclude a conviction where the evidence of a single witness includes an

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4. Formerly, under the proviso to s. 38(1) of the Children and Young Persons Act 1933 a child's unsworn evidence for the prosecution required corroboration; and the proviso was construed as precluding corroboration of a child's unsworn evidence by the unsworn evidence of another child: Hester [1973] AC 296, 303B. However, the Criminal Justice Act 1988 (i) repealed the proviso to s. 38(1) of the 1933 Act (except as to the evidence of a child complainant in a sexual offence), and (ii) went on to provide that the evidence of a child, whether sworn or unsworn, may be corroborated by the unsworn evidence of another child: s. 34(1), (3), s. 170(2), Sch. 16.

5. Sect. 88(7) contains a similar provision relating to temporary minimum speed limits. The requirement does not extend to overall speed limits on motorways: s. 89(3).

6. Thus, a police officer's evidence that he followed the accused in a police car and consulted its speedometer may suffice: the speedometer reading is evidence of a fact, not of opinion (Nicholas v. Penny [1950] 2 KB 466).

expression of opinion as part of his observations and conclusions.[7]

(b) Perjury

2.6 Under section 13 of the Perjury Act 1911 a person cannot be convicted of perjury or certain related offences "solely upon the evidence of one witness as to the falsity of any statement alleged to be false". This provision is further considered below.[8]

(c) Procuration offences under the Sexual Offences Act 1956

2.7 A person charged with procuring a woman by threats, intimidation, false pretences or false representations to have unlawful sexual intercourse;[9] with administering drugs in order to obtain or facilitate such intercourse;[10] with procuring a woman to become a prostitute;[11] or with procuring a girl under the age of twenty-one to have

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7. The requirements are reviewed in Crossland v. DPP [1988] 3 All ER 712, 716g-h, per Hutchison J. In that case, the prosecution evidence consisted of evidence given by a single police officer, who based his opinion as to the speed at which the defendant had been driving on a reconstruction of an incident (of which there were no witnesses) drawn from objectively determinable phenomena in the form of tyre burns, skid marks and damage to the defendant's vehicle. The Divisional Court held that s. 89(2) did not preclude conviction, since the purpose of the subsection was to give protection to a defendant only against a single witness's unsupported visual impression of a vehicle's speed.

8. Paras. 3.8-3.12 and 4.2.

9. Sexual Offences Act 1956, ss. 2 and 3.

10. Ibid., s. 4.

11. Ibid., s. 22.

unlawful intercourse anywhere in the world,[12] cannot be convicted "on the evidence of one witness only, unless the witness is corroborated in some material particular by evidence implicating the accused".[13]

3. Cases in which a corroboration warning must be given

(a) Introduction

2.8 By contrast with statutory corroboration requirements, in cases under this head a jury may convict despite the absence of corroboration, provided that the judge has duly warned them about the danger of doing so.[14]

2.9 The judge must warn the jury that it would be dangerous to convict on the uncorroborated evidence of any witness falling into one of the following categories -

(i) the complainant in a trial for a sexual offence (other than procuring[15]); or

(ii) an accomplice.

The list of categories where a corroboration warning is required is closed.[16]

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12. Ibid., s. 23.

13. Subsect. (2) of each section. A similar rule applies to an attempt to commit any of these offences: Criminal Attempts Act 1981, s. 2(1) and (2)(g).

14. e.g., Baskerville [1916] 2 KB 658, 664; Henry (1968) 53 Cr App R 150, 153-4.

15. Procuration offences are subject to a statutory requirement: see para. 2.7 above.

16. Spencer [1987] AC 128, 142H. There are, however, a number of other situations in which the judge may be required to warn the jury of a special need for caution

(b) Sexual offences

2.10 The need for a corroboration warning applies only to the complainant's evidence (and not, for example, to that of an eye-witness of the offence), but the age or sex of the complainant is immaterial. The requirement is peremptory; and the judge must explain to the jury why it is dangerous to convict in the absence of corroboration.[17] Since this must automatically be done in every case, irrespective of the actual nature of the evidence or of the witness, there has been a tendency for standard forms of explanation to be adopted. Until recently, the reason given for the warning in trials for sexual offences against a female was commonly based upon the alleged characteristics of women and girls in general. In Henry,[18] for example, Salmon LJ stated that the trial judge should point out, in effect, that

> "human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all".

In recent years, it appears that a general form of direction is often used which does not distinguish between male and

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16. Continued
in relation to the evidence of a particular witness: see paras. 2.33-2.37 below. Formerly, a corroboration warning was necessary in relation to the sworn evidence of a child, but (except as to the evidence of a child complainant in a trial for a sexual offence) the requirement was abolished by the Criminal Justice Act 1988, s. 34.

17. See para. 2.28 below.

18. (1968) 53 Cr App R 150, 153

female complainants.[19] However, in cases where the complainant is female, the judge may think it helpful to the jury to particularise by referring to the alleged characteristics of female complainants.[20]

2.11 Until recently, the corroboration warning had to be given in all cases falling into one of the two categories referred to in paragraph 2.9 above, even if the evidence related only to the identification of the accused. However, the Court of Appeal held in 1988[21] that the guidelines laid down in 1977 in Turnbull,[22] which are less stringent than the rules relating to corroboration,[23] are to be applied to sexual, as well as to other, offences. Accordingly, the

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19. In, e.g., Willoughby (1988) 88 Cr App R 91, 93, the trial judge directed the jury that -

> "The wisdom of the ages in the courts [has] shown that there are very great difficulties and dangers in regard to sexual crime. The reason is this, that almost invariably there are only two persons involved, no direct witnesses, and complainants can give false or merely mistaken evidence for different reasons. Sometimes they can deliberately invent an occasion, on others they may shield somebody they do not wish to be found a culprit, they may exaggerate or fantasise and it is not always easy for the defendant to prove, as it were, a negative."

Neither the accused nor the Court criticised this passage on appeal.

20. As, e.g., in the case referred to in the passage cited in para. 4.36 below.

21. Chance [1988] QB 932.

22. [1977] QB 224 (CA); for the guidelines, see para. 3.7 below.

23. Thus, e.g., although the Turnbull guidelines require the judge to warn the jury of the special need to exercise caution before convicting, he need not go so far as to direct them, either in terms or in effect, that it would be dangerous so to convict.

rules as to corroboration in sexual cases do not normally apply now in relation to identification evidence. The court explained -

> "There may no doubt be occasions when the sexual nature of the offence casts some doubts upon the complainant's identification evidence or adds to it a further peril, but in our judgment that possibility does not require judges on every occasion to give the usual [corroboration] warning. In the ordinary way a full Turnbull direction is sufficient, despite the sexual nature of the case. In the rare case where the sexual nature of the case may have affected the complainant's identification or where the judge in his discretion thinks it advisable, the Turnbull direction should be amplified to include a formal direction as to corroboration, tailored to the particular circumstances of the case."[24]

(c) Accomplices

2.12 In 1954 Lord Simonds LC stated[25] that (for the purpose of the law of corroboration) the term "accomplice" signified -

(i) a party to the offence, whether as principal or as accessory;[26] or

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24. Chance [1988] QB 932, 943. In our view this decision is of considerable significance in the present context: see para. 4.6 below.

25. Davies [1954] AC 378, 400.

26. Accomplices within this category, and possibly those within category (ii), cannot corroborate each other; see para. 2.22 below. Lord Simonds specifically included accessories after the fact (a category applicable only in felonies) within this category of accomplice; [1954] AC 378, 400. Sect. 1 of the Criminal Law Act 1967 abolished the distinction between felonies and misdemeanours, and provided that the former law relating to misdemeamours should prevail, thereby (consequentially) abolishing the law governing accessories after the fact. However, s. 4 of the Act

(ii) a receiver[27] of stolen goods, when testifying at the trial of a person alleged to have stolen them; or

(iii) a party to another offence committed by the accused of which evidence is admitted.

2.13 However, if the accomplice's evidence wholly fails to incriminate the accused, a corroboration warning is not necessary for the accused's protection and need not be given.[28]

2.14 The corroboration rules do not extend to the evidence of a defendant that, though incriminating his co-defendant, is given on his own behalf: the rules apply only to testimony given by a prosecution witness.[29]

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26. Continued
introduced a new offence of impeding the apprehension or prosecution of a person who has committed an arrestable offence. We are not aware of any authority on whether a prosecution witness who has committed an offence under s. 4 is regarded for the purposes of the law relating to corroboration as an accomplice of the person whose apprehension or prosecution he has impeded.

27. It is not clear whether a person who, otherwise than by receiving stolen goods, commits the offence of "handling" (with which the Theft Act 1968 replaced the offence of receiving) falls within this description.

28. Peach [1974] Crim LR 245 (CA). In Royce-Bentley [1974] 1 WLR 535, an accomplice gave evidence most, but not all, of which was favourable to the accused. In the absence of the jury, the trial judge consulted the accused's counsel, who agreed that a warning would not assist his client; and none was given. Approving that course, Lord Widgery CJ explained (at p. 539B) that a corroboration warning need not be given if the judge concluded that, on the whole, more harm would be done to the defence by giving it than by not doing so.

29. Davies v. DPP [1954] AC 378, 399 (per Lord Simonds); Bagley [1980] Crim LR 572; Loveridge (1982) 76 Cr App R 125. However, a warning of some kind must be given in respect of such evidence: see para. 2.34 below.

B. EVIDENCE CAPABLE OF CONSTITUTING CORROBORATION

1. Introduction

2.15 It has been judicially stated on innumerable occasions that there is nothing technical about the concept of corroboration. Lord Reid, for example, explained -

> "When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."[30]

2.16 It is, however, for the judge to determine, as a matter of law, whether a particular item of evidence is capable of providing corroboration; and the courts have developed detailed rules to resolve this question.[31] The issue only loses its "technical" character at a later stage, when, having determined that the item of evidence in question is capable of being corroborative, the judge tells the jury what is meant by corroboration and invites them to assess that item.[32] The fact that a particular item

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30. Kilbourne [1973] AC 729, 750F-G. Again, in Hester [1973] AC 296, 325C, Lord Diplock stated that the word "confirmed", which was "commoner in ordinary usage", meant the same as "corroborated".

31. The Advisory Group on Video Evidence, chaired by His Honour Judge Pigot QC, the Common Serjeant of London, observed at para. 5.22 of its Report (December 1989): "Whether a particular piece of evidence is capable of providing corroboration is ... often a complex technical question." For the Advisory Group's recommendations, see paras. 3.13-3.14 below.

32. The question whether evidence does in fact constitute corroboration is for the jury. The respective functions of judge and jury are considered more fully at paras. 2.28-2.30 below.

confirms (in the ordinary sense of rendering more probable) a witness's testimony does not, without more, suffice to render it capable of being corroborative; and, conversely, evidence that implicates the accused in a material particular may be capable of corroborating a witness's testimony even though it does not relate to any part of such testimony.[33]

2.17 At one time there was a view that the judge ought to direct the jury that, before considering the question of corroboration, they should assess the credibility of the witness whose testimony was subject to the corroboration requirement in isolation from other evidence; and that only if thus satisfied of his credibility, should the jury go on to examine corroborative evidence.[34] This view, that there is a two-stage process, has now been rejected.[35] The correct approach is that, in determining whether the evidence requiring corroboration is credible, the jury

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33. "The corroborative evidence need not relate to the particular incident or incidents spoken to by the 'suspect' witness. For example, evidence of an accomplice that he heard the accused planning the robbery charged may be corroborated by forensic evidence linking the accused with the scene of the crime": Archbold, 43rd ed. (1988), para. 16-6, citing Beck [1982] 1 WLR 461 (see n. 46, para. 2.20 below.)

34. e.g., Olaleye (1986) 82 Cr App R 337, 340. This view was based on, among other judicial statements, that of Lord Morris of Borth-y-Gest in Hester [1973] AC 296, 315F, that -

> "The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. ... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible ... ."

35. Attorney-General of Hong Kong v. Wong Muk Ping [1987] AC 501.

should take into account the presence or absence of corroborative evidence (as well as evidence that, though not corroborative, goes to credibility).[36]

2.18 The rules governing the question whether evidence is capable of being corroborative are the same for cases in which corroboration is required by statute as for those cases subject to the common law corroboration rules.[37] We first turn to consider, the two conditions that evidence must satisfy in order to be capable of amounting to corroboration - namely, that (as well as being admissible in accordance with the general law of evidence[38]) it is (a) independent and (b) implicates the accused in the offence charged in a material particular. We then go on to consider specific aspects of the corroboration rules.

2. Corroborative evidence must be independent

2.19 A witness cannot corroborate himself. For example, a diary used by a witness to refresh his memory in the witness box cannot corroborate his testimony. Since corroboration must come from an independent source, extraneous to the supect witness, evidence of a "recent complaint" made by the alleged victim of a sexual offence is not capable of being corroborative of her testimony.[39] This rule obtains notwithstanding that both the making and the

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36. Turner (1975) 61 Cr App R 67, 84 (approved in Attorney-General of Hong Kong v. Wong Muk Ping [1987] AC 501, 512B-E).

37. Baskerville [1916] 2 KB 658, 667.

38. Scarrott [1978] QB 1016, 1021.

39. e.g., Christie [1914] AC 545. This principle has been justified on the ground that it would otherwise only be necessary for the complainant to "repeat her story some twenty-five times in order to get twenty-five corroborations of it": Whitehead [1929] 1 KB 99, 102.

substance of a complaint are admissible, as "evidence of the consistency of the prosecutrix with the story told by her in the witness box and as being inconsistent with her consent to that of which she complains."[40] There is a distinction between evidence of a "recent complaint" and that of the victim's distressed condition[41] shortly after the alleged sexual offence. As a matter of law, the victim's distress may be capable of amounting to corroboration;[42] but where (as is commonly the case) the distress accompanies the complaint "the jury should be told that they should attach little, if any, weight to that evidence because it is all part and parcel of the complaint".[43]

3. Corroborative evidence must implicate the accused

2.20 Before the leading case, Baskerville,[44] there were two opposing views. The first was that corroboration consisted in independent evidence that verified any part of a witness's testimony; the other, which prevailed in

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40. Lillyman [1896] 2 QB 167, 170; Osborne [1905] 1 KB 551, 559-561.

41. As distinguished from evidence such as visible injuries or torn clothing, which is clearly capable of providing corroboration.

42. Provided that the jury are satisfied that the distress was not feigned: Redpath (1962) 46 Cr App R 319. In that case a person saw the accused approach the victim, a child, on a lonely road and witnessed the child's distress after the accused had driven off. Since she was unaware that she was observed, the risk of concoction was minimal; and the witness's evidence was held, accordingly, to be capable of providing corroboration.

43. Redpath (1962) 46 Cr App R 319, 322. See Wilson (1973) 58 Cr App R 304.

44. [1916] 2 KB 658 (CCA).

Baskerville,[45] was that, in addition, the corroborative evidence must implicate the accused in the commission of the offence.[46] The distinction may be illustrated by the facts in Birkett.[47] The accused was charged with sheep-stealing, and, after evidence of the theft, an accomplice repeated statements made by him to the police concerning the whereabouts of the sheep's skins. Another witness proved (a) that the skins were found where the accomplice said they would be discovered, and (b) that mutton corresponding to the carcases of the stolen sheep was found in the accused's house. On the first view of the nature of the required corroboration, item (a) would have been sufficient to constitute corroboration. However, on the view that prevailed in Baskerville, item (a) was not corroboration. Item (b) sufficed for corroboration according to either view.[48]

2.21 To illustrate further: in one case[49] the testimony of the complainant in a charge of rape was supported by medical evidence proving that someone had intercourse with her at about the time in question. This evidence was held not to suffice as corroboration, since it did not show that the accused was a party to the rape (or absence of consent).

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45. [1916] 2 KB 658, 667.

46. However, the evidence that implicates the accused need not specifically confirm any part of the evidence of the witness whose evidence requires corroboration. In Beck [1982] 1 WLR 461, the Court of Appeal rejected a submission that if the witness whose evidence required corroboration said nothing to incriminate the accused on a particular aspect of the case, other evidence which implicated the accused in relation to that part of the case could not constitute corroboration.

47. (1839) 8 Car & P 732, 173 ER 694.

48. Cross on Evidence, 6th ed (1985), p. 219.

49. James (1970) 55 Cr App R 299 (PC).

In another case,[50] where the accused was charged with attempting to procure a girl to become a prostitute,[51] the complainant gave evidence that the accused had committed another offence, with which he was not charged, as to which there was supporting evidence; but there was no supporting evidence in respect of the offence charged. The (statutory) corroboration requirement was held not to be satisfied, since the evidence relied on as corroboration did not implicate the accused in the offence charged.[52]

4. Accomplices cannot corroborate one another

2.22 Accomplices who are parties to the offence charged[53] are incapable of corroborating one another;[54] thus, if A, B and C are accomplices within this category, B's evidence against C is not corroborated by anything to which A deposes. By contrast, however, where evidence of an accomplice is supported by independent evidence of an accomplice to another offence which is admissible under the similar fact principle,[55] that evidence is capable of providing corroboration.

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50. Goldstein (1914) 11 Cr App R 27.

51. Contrary to what is now the Sexual Offences Act 1956, s. 22(1).

52. The result would have been different had evidence of the other offence been admissible under the "similar fact" principle: see paras. 2.25-2.26 below.

53. i.e., who fall within the first or second category referred to at para. 2.12 above: Kilbourne [1973] AC 729, 748G (per Lord Hailsham).

54. e.g., Kilbourne [1973] AC 729, 747-748 (per Lord Hailsham of St Marylebone LC). Lord Hailsham considered this old rule to be an aspect of the rule that corroborative evidence must be independent from the evidence that it supports.

55. See paras. 2.25-2.26 below.

5. Corroboration by the accused

(a) General

2.23 In some circumstances corroboration may be provided by the accused. Thus, an admissible extra-judicial confession will suffice, as will admissions made by him when giving evidence.[56] Again, deliberate lies, told in or out of court, may constitute corroboration, but only if the following conditions are satisfied -

(1) The lie must relate to the offence in question; evidence merely proving him to be generally untruthful cannot constitute corroboration.[57]

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56. The accused's silence when charged by a police officer is not normally capable of corroborating other evidence against him. In its Report, published in July 1989, a Home Office Working Group on the Right of Silence proposed that, in certain circumstances, inferences adverse to the accused may be drawn at his trial from his previous failure to answer questions or to mention a particular fact. However, the Working Group expressed the view (at para. 85) that the present law of corroboration was unsatisfactory, adding that the Law Commission was currently reviewing the topic and that its recommendations should be awaited before "any final decision is reached about the corroborative value of silence". The Group concluded (at para. 86) that, "even when aggregated with other evidence", the previous failure of the accused to answer questions or to mention a particular fact should not be capable of amounting to corroboration. This Report also contains recommendations for advance disclosure of an accused's defence in the Crown Court: failure to disclose, or material departure at the trial from a disclosed defence, would entitle counsel and the judge to comment and the jury to draw inferences, but, again, would not be capable of amounting to corroboration (para. 110).

57. In West (1983) 79 Cr App R 45, the prosecution alleged that the accused assaulted the complainant in one room and then, some time afterwards, returned and raped her in another room. At the trial the accused at first denied, but later admitted, his presence at the scene of

(2) The motive for the lie must be realisation of guilt and a fear of the truth; in appropriate cases "the jury should be reminded ... that people sometimes lie ... in an attempt to bolster up a just cause or out of shame or out of a wish to conceal disgraceful behaviour from their family."[58]

(3) The accused's statement must be shown to be a lie by evidence other than that of the witness to be corroborated - that is, by admission or by evidence from an independent source.[59]

(b) Section 62 of the Police and Criminal Evidence Act 1984

2.24 This section provides for the taking of an "intimate sample"[60] from a person in police detention. The power is, however, subject to conditions;[61] in particular, it may not be exercised without the written consent of that person.[62] However, if a request for an intimate sample is

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57. Continued
the assault. It was held that since his lie might have been told in relation to the assault, it did not constitute corroboration in respect of the charge of rape.

58. Lucas [1981] QB 720, 724F-G (Lord Lane CJ).

59. Lucas [1981] QB 720.

60. Defined as: samples of blood, semen or other tissue fluid, urine, saliva, pubic hair, and swabs taken from body orifices : s. 65.

61. e.g., authorisation, which can be given only on certain grounds, of a police officer with at least the rank of superintendent must be given for the sample to be taken.

62. In the case of a person aged under 17 but over 14, consent must also be given by his parent or guardian; and in the case of someone under 14, only his parent's or guardian's consent is required: s. 65.

refused "without good cause", the jury "may draw such inferences from the refusal as appear proper", and, on the basis of such inferences, the refusal may be treated as capable of amounting to corroboration of any other evidence against the accused.[63]

6. The "similar fact" principle

2.25 As a general rule, evidence of the accused's misconduct on an occasion other than that which is the subject of the charge is inadmissible. There are, however, exceptions. One is that such evidence is admissible if the similarity betweeen such misconduct and the offence charged goes beyond merely suggesting that the accused is the kind of person to commit the offence charged, and is so striking as to point strongly to the conclusion that the accused is guilty of the instant charge.[64]

2.26 If independent evidence of misconduct on a different occasion is admissible under the similar fact principle, it is ipso facto capable of constituting corroboration in relation to the offence charged.[65] The

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63. Sect. 62(10). The section applies to summary trials and committal proceedings as well as trials on indictment.

64. Proper examples of this principle are "extremely rare": Wells [1989] Crim LR 67, 68. It is for the judge to state what evidence may in his judgment be regarded as strikingly similar, and for the jury to decide whether they find that evidence so strikingly similar as to eliminate coincidence and thus be indicative of guilt: Maher, The Times, 19 October 1989.

65. Kilbourne [1973] AC 729, and in particular Lord Cross at p. 760. Lanford v. General Medical Council [1989] 3 WLR 665 (PC) is a recent illustration. In proceedings before the General Medical Council (governed by rules largely identical with those applied in a criminal trial), a medical practitioner was charged with professional misconduct in the form of improper language and behaviour in his examinations of two female patients on occasions 6 days apart. On both occasions the

evidence of such other misconduct need not itself be corroborated.[66]

7. Corroborative evidence may be cumulative

2.27 It is not necessary for each item of evidence tendered as corroboration independently to implicate the accused, without regard to other corroborative evidence. For example, in a rape case in which the accused denies having had sexual intercourse with the complainant, it may be possible to prove (1) by medical evidence that the complainant had had sexual intercourse within an hour or so prior to the examination, (2) by other independent evidence that the defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts. In combination, these items are capable of providing corroboration of the complainant's evidence, although no item on its own would suffice.[67]

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65. Continued
accused's examination was accompanied by "heartily obscene and sexually suggestive" language, which was strikingly similar (though his behaviour was not). The evidence of one patient was, it was held, capable of corroborating the other's when (as in the instant case) the complainants gave independent evidence of separate visits and the circumstances excluded the possibility of a jointly fabricated account.

66. In, e.g., Sanders (1961) 46 Cr App R 60, A's complaint of homosexual assault was supported by "similar fact" evidence from B, who claimed to have been similarly assaulted by the accused a few weeks before. The Courts Martial Appeal Court considered that a corroboration warning as to B's evidence was unnecessary.

67. Hills (1987) 86 Cr App R 26, 26.

C. PROCEDURE

1. Judge and jury

2.28 The question whether particular evidence is capable of providing corroboration is a question of law for the judge,[68] and he must explain to the jury the meaning of corroboration; but the question whether evidence is in fact corroborative must be left to the jury.[69] Where corroboration is required by statute, but is plainly not present, the judge must direct an acquittal.[70] In the cases at common law, where merely a corroboration warning is required, the procedure is somewhat complex. The judge should: (i) warn the jury that it would be dangerous to convict without corroboration, and explain why; (ii) direct the jury as to what evidence is and is not capable of providing it;[71] and (iii) explain that if nevertheless, after giving full weight to his warning, they are satisfied without any doubt that the testimony of the witness who gave the uncorroborated evidence is truthful, the absence of corroboration does not matter, and they may convict.[72] The

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68. Where there is no evidence capable of amounting to corroboration, the judge must so direct the jury: Anslow [1962] Crim LR 101; Nagy [1990] Crim LR 187.

69. It is improper for the judge to direct the jury that, as a matter of law, corroboration exists: Tragen [1956] Crim LR 332 (CCA).

70. Davies [1954] AC 378.

71. This was said by Lord Widgery CJ to be "quite vital": Reeves (1978) 68 Cr App R 331, 332. In cases where there is a risk of the jury thinking, erroneously, that a particular item of evidence is capable of amounting to corroboration, the judge must warn them that it cannot do so: Goddard [1962] 1 WLR 1282.

72. See, e.g., Henry (1968) 53 Cr App R 150, 153-4. It is desirable that at the conclusion of the evidence the judge should hear submissions from counsel (i) on the matters of which the jury should be directed to look for corroboration (e.g., in a rape case, of the complainant's evidence that intercourse took place and that she did not consent, if both elements are in

judge need not use any particular form of words;[73] but his directions must be clear and forceful.

2.29 In some cases, particularly those in which there are several accused and several charges, the question whether a prosecution witness is an accomplice may be difficult to resolve. If there is a dispute as to this issue, the matter must be left to the jury. Accordingly, the judge's directions in such a case are even more complex than where that issue does not arise: before giving directions relating to corroboration, he must direct the jury on the meaning of the term "accomplice" and on the evidence relating to that issue, and invite them to consider whether the witness is in fact an accomplice.

2.30 It follows that the judge's task in a case that raises corroboration issues can be one of some complexity.

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72. Continued
issue), and (ii) on what evidence is capable of amounting to corroboration: Ensor [1989] 1 WLR 497, 505H-506A (CA). In Nagy [1990] Crim LR 187 (which concerned a sexual offence), the Court of Appeal allowed an appeal on the ground that the trial judge had not made clear that there was no corroboration of the complainant's evidence. The Court added however (at p. 188) that, possibly, a discussion between the trial judge and counsel on the question of corroboration (which did not take place) might have led to his directing the jury that a certain matter as to which the complainant had testified was capable of providing "potent corroboration".

73. e.g., in Spencer [1987] AC 128, 141C-E, Lord Ackner explained, as to the warning of the danger of convicting upon uncorroborated evidence, that there are no set words which must be adopted to express the warning, but, rather, that the summing up should be tailored to suit the particular case. Again, Lord Hailsham of St Marylebone LC suggested in Kilbourne [1973] AC 729, 741A, that since the word "corroboration" was slightly unusual in ordinary speech, it might be better not to use it.

It was summarised by Lord Ackner in Spencer[74] in the following terms-

> "Where there is no corroboration, the rule of practice merely requires that the jury should be warned of the danger of relying upon the sole evidence of an accomplice or of the complainant in the sexual case ... . The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance. The jury are, of course, told that while as a general rule it is dangerous so to act, they are at liberty to do so if they feel sure that the uncorroborated witness is telling the truth. Where, however, there is evidence before the jury which they can properly consider to be corroborative evidence the position becomes less simple. The trial judge has the added obligation of identifying such material, and explaining to the jury that it is for them to decide whether to treat such evidence as corroboration. He should further warn them against treating as potential corroborative evidence, that which may appear to them to be such, but which is not so in law, e.g. evidence of a recent complaint in a sexual offence. Moreover where the prosecution are relying, as potential corroborative material, upon lies alleged to have been told by the accused, a particularly careful direction is needed. A special direction is also often needed where evidence of complainant's distress is relied upon by the prosecution in sexual cases as potentially corroborative material. The trial judge has further the additional obligation of directing the jury that accomplices, who are parties to the same charge, cannot corroborate each other."

2. Appeals

2.31 In the absence of a full corroboration warning, including directions on what evidence is and is not capable of constituting corroboration, a conviction will generally[75]

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74. [1987] AC 128, 140.

75. Though not inevitably, quite apart from the proviso to s. 2(1) of the Criminal Appeal Act 1968 (whereby the Court of Appeal may dismiss an appeal if satisfied that "no miscarriage of justice has actually occurred"). If,

be quashed on appeal:[76] although there is no hard and fast rule[77] against the application of the "proviso",[78] it is applied only in exceptional cases.[79]

3. Summary trials

2.32 In summary trials a magistrates' court must take into account the matters on which, had the trial been on indictment, the judge would have directed the jury.

D. SUSPECT WITNESSES TO WHOM THE CORROBORATION RULES DO NOT APPLY

2.33 A body of authority has evolved over recent years relating to cases in which the evidence of certain kinds of witness may be suspect, although he or she is outside the two established categories of witness[80] whose evidence calls

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75. Continued
e.g., the judge failed to direct the jury on what items of evidence could and could not provide corroboration, the conviction will not be quashed where there was no evidence that the jury might mistakenly have thought could amount to corroboration: Gill, unreported, 18 October 1988.

76. Trigg [1963] 1 WLR 305, 309. ("In principle this court feels that cases where no warning as to corroboration is given where it should have been should, broadly speaking, not be made the subject of the proviso ... "); Birchall (1985) 82 Cr App R 208, 211; Willoughby (1988) 88 Cr App R 91, 96.

77. McInnes (1989) 90 Cr App R 99, 103.

78. i.e., the proviso to s. 2(1) of the Criminal Appeal Act 1968, whereby the Court of Appeal may dismiss an appeal if satisfied that "no miscarriage of justice has actually occurred".

79. Willoughby (1988) 88 Cr App R 91, 96.

80. i.e., (i) an accomplice of the defendant or (ii) the complainant in a trial for a sexual offence.

for a corroboration warning. Previously, there were authorities suggesting that the corroboration requirements should be extended to such witnesses, but these suggestions have since been disapproved. The present law is that in such cases the judge should warn the jury of the need for special caution in assessing the reliability of the testimony of such witnesses, but the corroboration rules do not apply. The reason for the distinction between these cases and those to which the corroboration rules apply is historical, rather than principled. Today, on the one hand, the courts recognise the need for some kind of warning to be given to the jury in cases analogous to those to which the corroboration rules apply;[81] but take the view that

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81. In practice the warning will often take the form of a direction that the presence or absence of supporting (i.e., in the loose sense referred to in paragraph 1.2 above, "corroborative") evidence is a cogent factor to be taken into account by the jury in assessing the reliability of the suspect witness and the weight to be attached to his testimony; and in particular cases judges have, in the exercise of their discretion as to the form that the warning should take, given a warning that is in effect in the same terms as a "full" corroboration warning. Nevertheless, the appellate courts today consistently resist attempts to extend the categories of witness to whom the corroboration rules apply. In Beck [1982] 1 WLR 461, 467G-H (considered further at para. 2.35 below), for example, the Court of Appeal rejected a defence submission that wherever a party, though not an accomplice, had a "substantial interest" of his own for giving false evidence, the judge must give the same direction as in the case of an accomplice. Ackner LJ, delivering the court's judgment, explained that -

> "It would be a totally unjustifiable addition to require [the judge], not only fairly to put before the jury the defence's contention that a witness was suspect, because he had an axe to grind, but also to evaluate the weight of that axe and oblige him, where the weight is 'substantial', to give an accomplice warning with the appropriate direction as to the meaning of corroboration together with the identification of the potential corroborative material."

defendants in such cases are sufficiently protected without the rigid, highly technical corroboration rules forged in an earlier era.

2.34 One case of this kind is that of a defendant who gives evidence in his defence that prejudices his co-defendant.[82] In Knowlden,[83] for example, the Court of Appeal held that in such cases the judge should at least give what it called the "customary clear warning", where damaging evidence has been given by one defendant against another, to examine the evidence of each with care because each may have an interest of his own to serve. Normally, this will suffice; but in rare instances, having regard to the nature and severity of the attack made by one co-defendant upon another, it may be necessary for the judge to go further, and actively direct the jury to look for corroboration in the technical sense, and indicate what evidence can or cannot provide it.

2.35 Another example of this category of witness is a person who apparently has a motive for giving false evidence. For example, in Beck,[84] which concerned a charge for conspiracy to defraud a finance company by securing payment against bogus satisfaction notes, the directors of the allegedly defrauded company gave evidence for the prosecution. They had themselves claimed substantial sums from their insurers in respect of the alleged frauds. The defence suggested that the directors had known throughout that the notes were not genuine; that this exposed them to risk of prosecution for attempting to defraud their

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82. Since the co-accused is not a prosecution witness, he is not within the corroboration rules: see para. 2.14 above.

83. (1981) 77 Cr App R 94.

84. [1982] 1 WLR 461.

insurers; and that therefore they had a purpose of their own to serve. (This would not make them accomplices to the offence charged: if the allegations were true, the finance company would not have been defrauded.) The trial judge advised the jury to pay particular care and attention to the directors' evidence, and the weight (if any) they attached to it; but he stopped short of giving a full corroboration warning. The Court of Appeal approved his approach, referring to

> "the obligation [in cases not requiring the full corroboration warning] upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case."[85]

2.36 A third example is that of a witness who is mentally abnormal. In Spencer, nurses at Rampton Special Hospital were charged with ill-treating inmates. The trial judge warned the jury to be "extremely cautious" when assessing the evidence of the inmates called for the prosecution, and explained why their evidence might be suspect; but he did not direct the jury that it would be dangerous to convict in the absence of corroborative evidence that incriminated the nurses. It was held by the Court of Appeal[86] that this direction was entirely adequate.

2.37 Spencer subsequently came before the House of Lords,[87] who upheld the Court of Appeal; but the decision of the House of Lords is not free from difficulty. Lord

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85. [1982] 1 WLR 461, 469. This passage was cited with approval by Lord Ackner in Spencer [1987] AC 128, 140C-D.

86. [1985] QB 771.

87. [1987] AC 128.

Ackner, with whom the other Law Lords agreed, indicated that the complainants' evidence did not call for a full corroboration warning to be given,[88] and he expressed agreement "with the Court of Appeal that [the trial judge] gave the emphatic warning which was required to meet the justice of the case".[89] However, by way of answer to the question certified by the Court of Appeal,[90] Lord Ackner went on to say that the judge must warn the jury that it was dangerous to convict on the uncorroborated evidence of a witness who, though outside the corroboration rules, fulfilled analogous criteria "by reason of his particular mental condition and criminal connection".[91] Lord Ackner made clear that, by contrast with the cases within the corroboration rules, the extent to which the judge need make reference to potential corroborative material depended on the facts of each case, the overriding rule being that he must put the issues fairly and adequately. However, the answer given to the question certified by the Court of

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88. [1987] AC 128, 142A-E.

89. [1987] AC 128, 142E-F.

90. Namely, "in a case where the evidence for the Crown is solely that of a witness who is not in one of the accepted categories of suspect witnesses, but who, by reason of his particular mental condition and criminal connection, fulfilled the same criteria, must the judge warn the jury that it is dangerous to convict on his uncorroborated evidence"? (Lord Ackner slightly amended the question by substituting "analogous criteria" for "the same criteria": [1987] AC 128, 142F.)

91. [1987] AC 128, 142F. In Simmons [1987] Crim LR 630, which concerned a charge of false imprisonment, the complainant had attended a psychiatrist for treatment for anxiety. The Court of Appeal rejected the defendant's argument, based on Spencer, that the complainant's testimony fell within a category "kindred to" that of accomplices and complainants in sexual cases, and that in consequence a corroboration warning was mandatory. The court distinguished Spencer on the ground that the complainant in the instant case had no convictions and did not suffer from a mental disorder.

Appeal, by requiring the direction in such cases to be couched in terms of the danger of convicting on uncorroborated evidence, seems difficult to reconcile with the earlier part of Lord Ackner's speech (in which he emphasised that the case did not fall within a category requiring the application of the corroboration rules) or with the judgments of the Court of Appeal in Spencer and in Beck (which latter was approved in Spencer[92]).

92. [1987] AC 128, 142G-H. The reply to the certified question leads it to be suggested by Andrews and Hirst, Criminal Evidence (1987), para. 9.40, that, in view of Spencer, the difference between a full corroboration warning and the warning to be given in the case of a suspect witness who is not within the corroboration rules does not now lie in the strength or nature of the warning itself. The learned authors suggest that the distinction, rather, is that in cases outside the corroboration rules the judge need not concern himself with the technicalities of what evidence is capable of being corroborative and what is not.

PART III

PREVIOUS REVIEWS OF THE SUBJECT

A. INTRODUCTION

3.1 Four previous reports are in point. In the first (and most important), the Criminal Law Revision Committee (the "CLRC") included a review of the topic in some detail in its Eleventh Report (1972),[1] and made recommendations for reform. Second, in 1976 the Devlin Committee[2] reviewed and made recommendations concerning identification evidence, in the course of which it considered corroboration; and (third), in 1979, in its Report on Offences relating to Interference with the Course of Justice,[3] the Law Commission made recommendations as to corroboration in trials for perjury committed in judicial proceedings. Finally, in December 1989 a Home Office Advisory Group[4] published recommendations relating to the admissibility of video-recorded evidence given by children and other vulnerable witnesses. One of those recommendations concerned the corroboration rules relating to the complainant's testimony in trials for sexual offences. We consider each report in turn.

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1. "Evidence (General)", Cmnd. 4991.

2. Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases.

3. Law Com. No. 96.

4. Under the Chairmanship of His Honour Judge Pigot QC, the Common Serjeant of London.

B. THE ELEVENTH REPORT OF THE CRIMINAL LAW REVISION COMMITTEE (1972)[5]

1. General

3.2 In 1964 the CLRC was asked to review the law of evidence in criminal cases. It conducted extensive consultations. In its Report the Committee explained that -

> "We began by sending a circular letter to a number of persons and bodies concerned in the administration or teaching of the law in which we asked for their views ... . The chairman [Lord Justice Edmund Davies] wrote in similar terms to all the lords of appeal and and judges of the Supreme Court who were or had been concerned with the criminal law, to the judges of the Central Criminal Court and to a number of recorders and chairmen of quarter sessions ... ."[6]

Subsequently, in May 1968, the CLRC again consulted the same persons and bodies, except that on this occasion they consulted <u>all</u> the judges of the Supreme Court.[7]

3.3 The CLRC's criticisms of the existing law and its recommendations for reform are considered below.[8] It will

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5. At pp. 106-121, paras. 174-203. The Report is accompanied by a draft Bill (at pp. 183-185, clauses 17-21) and explanatory notes (pp. 226-228). For convenience we shall refer to the Committee and to this Report as "CLRC".

6. p. 5, para. 3. The CLRC also investigated the position in the United States, Canada, France and Germany; p. 2, paras. 5-6.

7. The CLRC explained (at p. 7, para. 9) that it had formed views, some nearly final, some very provisional, on the most important matters and thought that, in view of the difficult and controversial character of some items, consultees should be given the opportunity to express views on the proposed changes. In fact, the majority of consultees agreed substantially with the CLRC's provisional proposals on most matters.

8. Paras. 4.12-4.14, 4.27-4.29, 4.31-4.33.

suffice here to outline the CLRC's main recommendations concerning the existing common law corroboration rules. Those recommendations were that -

(1) Corroboration of the victim's evidence should be required as a matter of law in the case of sexual offences against children (defined as persons under the age of 14).[9]

(2) The judge must warn the jury of a "special need for caution" before convicting on the uncorroborated evidence of the victim in trials for sexual offences against victims other than children.[10]

(3) In cases other than those referred to in (1) and (2): (a) any rule of law or practice whereby it is obligatory for the judge to give a warning about convicting on uncorroborated evidence should be abrogated, but (b) the judge should have a discretion, "having regard to the evidence", to give such a warning.[11]

(4) In giving a warning (whether obligatory or not) about convicting on uncorroborated evidence, the judge should not be obliged to use any particular form of words.[12]

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9. pp. 113-114, para. 188; draft Bill, clause 17(2) (p.184).

10. p. 113, para. 188; draft Bill, clause 17(1) (pp. 183-184).

11. p. 112, para. 185; draft Bill, clause 20(1) (p. 185).

12. p. 113, para. 188; draft Bill, clause 20(2) (p. 185).

(5) Any rule of law or practice whereby the evidence of one witness cannot corroborate that of another (for instance, the rule that accomplices cannot corroborate one another) should be abrogated.[13]

C. THE REPORT OF THE DEVLIN COMMITTEE (1976)

3.4 The Devlin Committee's terms of reference were to review, in the light of the wrongful convictions in two specified cases (and of other relevant cases), the law and procedure relating to identification in criminal cases, and to make recommendations. The Committee considered in some detail[14] certain proposals for the reform of the law of evidence, each designed as a safeguard against too ready an acceptance of evidence of visual identification. Among them were: (i) that a jury should be directed as a matter of law not to convict without corroboration, and (ii) that a jury should be specially warned of the danger of doing so. When considering these proposals the Committee made frequent references to the views expressed by the CLRC in its Eleventh Report.

3.5 The Devlin Committee rejected the adoption of a corroboration requirement. In addition to giving reasons for concluding that a corroboration requirement was unsuitable in the specific context of identification evidence, the Committee suggested that belief in the value of that requirement generally was declining: after observing that "some of the great text book writers have always

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13. p. 116, para. 194; draft Bill, clause 19(1) (p. 184).

14. pp. 77-86, paras. 4.27-4.53.

criticised it on the ground of its rigidity",[15] the Committee went on to refer to the CLRC's account of the difficulties of determining what evidence did and did not amount to corroboration and of the technical distinctions to which those difficulties had given rise.[16] The Devlin Committee also stated that, in the opinion of the majority of its own consultees, the formulation of a fair and workable corroboration rule would be impossible.[17]

3.6 The Devlin Committee recommended[18] that the judge should be required by statute -

> (a) to direct the jury that it is not safe to convict upon eye-witness evidence (even of more than one witness) unless the circumstances of the identification are exceptional or such evidence is supported by substantial evidence of another sort; and

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15. p. 80, para. 4.36. We share this view: see paras. 4.11-4.14 below.

16. The Devlin Committee (at p. 80, para. 4.36) pointed out that the CLRC was not in favour of introducing any sort of corroboration rule in relation to identification evidence. (The CLRC had recommended that if such evidence was disputed, the judge should be obliged to warn the jury of a special need for caution before convicting: CLRC Report, p. 117, para. 198; draft Bill, p. 185, clause 21.)

17. p. 82, para. 4.42. This was the view of the Home Office; of the Senate of the Inns of Court and the Bar (Criminal Bar Association); of both bodies who spoke for the magistrates; and of the four bodies who spoke for the police. Moreover, the Lord Chief Justice stated publicly that the absolute barring of a conviction in the absence of corroboration was unacceptable.

18. p. 150, para. 8.4.

(b) to indicate to the jury the circumstances, if any, which they might regard as exceptional[19] and the evidence, if any, which they might regard as supporting the identification; and

(c) if he is unable to indicate either such circumstances or such evidence, to direct the jury to acquit.

3.7 The recommendations of the Devlin Committee were not implemented by legislation. In Turnbull,[20] however, the Court of Appeal laid down guidelines which, though purportedly based on those recommendations,[21] are somewhat different from them. The court rejected both a general rule prohibiting conviction on evidence of visual identification alone; and also the use of the phrase "exceptional circumstances" (which the court thought likely to lead to a build-up of case law that would be a fetter to the administration of justice). What mattered in the end, Lord Widgery CJ explained, was the quality of the evidence in each case.[22] The Turnbull guidelines are, in summary, that -

(1) Whenever a case depends wholly or substantially on the correctness of one or more identifications of the defendant which the defence alleges to be mistaken, the jury should be warned of the special need for

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19. Although citing examples of "exceptional circumstances" (such as, where the accused was familiar to an eye-witness), the Committee's view was that on this point the law should be left to be developed by judicial precedent.

20. [1977] QB 224.

21. Ibid., 231.

22. [1977] QB 224, 231.

caution before convicting, with an explanation of the reasons for such caution.

(2) Furthermore, the quality of the identification should be considered and the jury should be directed to examine closely the circumstances in which the identification was made. Where the quality of the identification is good (as, for example, when made after a long period of observation), the jury can safely be left to assess the value of the evidence; but where the quality is poor (as, for example, where the evidence depends solely on a fleeting glimpse), the case should be withdrawn from the jury unless there is other evidence capable of supporting the identification.

(3) The judge should direct the jury on the evidence that is capable of supporting the identification.

D. PERJURY: THE CRIMINAL LAW REVISION COMMITTEE AND THE LAW COMMISSION

1. The present law

3.8 Under section 13 of the Perjury Act 1911 a person cannot be convicted of perjury or certain related offences "solely upon the evidence of one witness as to the falsity of any statement alleged to be false".[23] This provision, which restates the common law, has been judicially interpreted to mean that proof must be provided either by

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23. No corroboration is required of evidence of the accused's knowledge of, or belief in, the falsity of the statement at issue: O'Connor [1980] Crim LR 43.

two witnesses or by one witness with proof of other material and relevant facts substantially confirming his testimony.[24]

3.9 Notwithstanding that section 13 does not expressly refer to "corroboration", it requires the technicalities of the law relating to corroboration to be met.[25]

2. The recommendations of the Criminal Law Revision Committee

3.10 The CLRC distinguished perjury committed in the course of judicial proceedings from the many other offences of perjury in the 1911 Act (relating, for example, to statutory declarations). As to perjury in judicial proceedings, the CLRC, which considered that the requirement of corroboration should be retained, recommended that legislation should make clear that there need not be a second witness as to falsity; but that the consent of the Director of Public Prosecutions should be necessary for a prosecution.[26] By contrast, the Committee recommended[27] that section 13 should be disapplied to other forms of perjury.

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24. Threlfall (1914) 10 Cr App R 112. Hearsay or other inadmissible evidence is not corroboration: In re a Solicitor, The Times, 24 March 1978.

25. Hamid (1979) 69 Cr App R 324. Lawton LJ observed that throughout this century the courts had consistently construed the section as imposing a strict corroboration requirement.

26. pp. 114-115, paras. 190-191; draft Bill, p. 184, clause 18.

27. The CLRC expressed agreement with the provisional proposal to this effect that had been made by the Law Commission in Working Paper No. 33, "Perjury and Kindred Offences", para. 45.

3. The Law Commission's recommendations

3.11 In a Report published in 1979, the Law Commission made recommendations for reform of the law relating to perjury in judicial proceedings. As to corroboration, the Commission's recommendations were similar to the CLRC's.[28] The Commission gave as reasons for retaining the corroboration requirement: (i) that if perjury could be prosecuted merely as a result of one statement on oath contradicting the statement at issue, there would be a reluctance to give evidence (so that the corroboration requirement encouraged the giving of evidence), and (ii) that the requirement acted as a safeguard where a principal prosecution witness had a strong interest in securing the accused's conviction (as where the witness had been imprisoned in consequence of the accused's allegedly perjured evidence).[29]

3.12 The Commission did not review perjury committed otherwise than in judicial proceedings; this, the Commission explained, would be further considered in its work in progress on the law of fraud.[30]

E. THE REPORT OF THE HOME OFFICE ADVISORY GROUP ON VIDEO EVIDENCE

3.13 In December 1989, this Advisory Group, which was set up by the Home Office under the chairmanship of His Honour Judge Pigot Q.C., the Common Serjeant of London,

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28. "Offences relating to Interference with the Administration of Justice", Law Com. No. 96; p. 30, paras. 2.62-2.63; draft Bill, p. 122, clause 3(4).

29. The Commission found unconvincing, however, one reason often given - namely, that "else there is only oath against oath", since that situation could also arise in cases where corroboration was not required: p. 30, para. 2.62.

30. Law Com. No. 96, p. 17, para. 2.25. See further, para. 4.2 below.

published its proposals. The Group's terms of reference were to consider whether video recordings of interviews with child victims (and possibly other victims of crime) should be readily admissible as evidence in criminal trials. In its Report the Group made comprehensive recommendations concerning the admissibility of such evidence. One recommendation[31] was that, at trials for violent or sexual offences and offences of cruelty and neglect, interviews with children under the age of 14 (or in the case of sexual offences, under the age of 17) conducted by police officers, social workers or those whose duties include the investigation of crime should be admissible as evidence.[32] The Group also recommended that, at such trials, on application a court might direct that an adult who was likely to suffer an unusual and unreasonable degree of mental stress by giving evidence in open court should be treated as a "vulnerable" witness, with the consequence that the Group's proposals concerning children's evidence would be applied to his; there should, the Group further proposed, be a rebuttable presumption that victims of serious sexual offences fell into this category.[33]

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31. Paras. 2.25 and 2.36-2.37.

32. As to Crown Court proceedings, the Group recommended that there should be a pre-trial determination by the Court whether a particular video-recorded interview was to be admitted, such evidence to be excluded only if the Court considered that to admit it would be contrary to the interests of justice: paras. 2.27-2.28.

33. Para. 3.5. The Group proposed that this extension should take place, as a high priority, after its recommendations concerning children's evidence were implemented and working successfully, adding that if this could not be done reasonably soon in respect of all adult vulnerable witnesses, the earliest provision should be made for victims of serious sexual offences, who "face special and generally accepted difficulties": para. 3.15.

3.14 The Advisory Group reviewed the common law corroboration rules relating to the evidence of complainants in sexual cases, explaining that

> "the issue is of direct relevance to the question of video-recorded evidence because we think that unless the rule is altered our proposals for facilitating the testimony of children and of other vulnerable witnesses may, at any rate in so far as sexual offences are concerned, have a much more limited effect than we intend."[34]

The Group strongly criticised the present rules on several grounds, and recommended their abolition (without replacement) in relation both to child and to adult complainants. The relevant passages of its Report that deal with corroboration are set out in Appendix C to this paper.

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34. Para. 5.17.

PART IV

PROVISIONAL PROPOSALS FOR REFORM

A. INTRODUCTION

4.1 In this Part of the working paper we review the law governing corroboration; we conclude that for a variety of reasons the present rules are unsatisfactory; and we provisionally propose that they should be abolished. We go on, in Part V, to consider whether, on the assumption that our provisional proposals are implemented, provision should be made by legislation in relation to any category of evidence that might be considered suspect and, if so, the possible forms that such provision might take. We should welcome views both on our provisional proposals[1] and on the issues canvassed in Part V.[2]

B. STATUTORY CORROBORATION REQUIREMENTS

4.2 We do not propose further to consider two cases in which corroboration is required by statute - namely, speeding[3] and perjury.[4] The recommendation that we made in 1979[5] for "tidying up" the present statutory corroboration requirement relating to perjury committed in judicial proceedings formed an integral part of our proposals for reforming the substantive law. It would accordingly be

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1. See para. 4.42 below.
2. They are listed at para. 6.4 below.
3. Para. 2.5 above.
4. Para. 2.6 above.
5. In Law Com. No. 96; see para. 3.11 above.

inappropriate to deal with that requirement here, in isolation. Similarly, we do not in this paper consider the corroboration requirements relating to offences of perjury committed otherwise than in judicial proceedings: any review of such requirements would be inappropriate outside the context of a review of the substantive law governing those offences.[6]

4.3 As for the offence of speeding, the rule that precludes a conviction for speeding solely on the unaided opinion of a single witness as to the speed of a vehicle[7] is of a different kind from the issues with which we are concerned. It takes the form of a requirement that an opinion (as to the speed of a vehicle) must be supported; our concern, by contrast, is with the testimony of certain categories of witness who depose as to fact. Moreover, and perhaps more important, the 1988 Road Traffic Law Review Report,[8] which included a review of the rules of evidence governing this offence, made no recommendation concerning this provision.[9] We have concluded that a review of the

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6. In Law Com. No. 96 (1979), para. 2.25, we stated that we would further consider this topic in the context of our "work in progress" on fraud. In fact, however, no work is now in progress that involves such further consideration. As we explained in our working paper on conspiracy to defraud (Working Paper No. 104 (1987), para. 4.52, n. 86), there appears to be no pressing need for reform of the offences in question.

7. Para. 2.5 above.

8. The Review was chaired by Dr Peter North.

9. The Report noted, at para. 3.18: "At present speed detection involves a police officer witnessing an offence and using a speed measuring device to confirm his judgement." The Report went on (at paras. 3.18-3.24) to consider the use of technology to aid detection, and recommended a change in the law to provide that a person may be convicted of a speeding offence solely on the basis of evidence given by photographs taken in conjunction with tested and approved measuring devices.

provision in this exercise would be inappropriate.[10]

4.4 Of the cases in which corroboration is required by statute, there remains only that relating to various offences of procuration under the Sexual Offences Act 1956.[11] Since, however, the considerations applicable to the common law corroboration rules relating to trials for sexual offences substantially extend to the statutory requirement,[12] it does not call for separate treatment.

C. OUR CRITICISMS OF THE COMMON LAW CORROBORATION RULES

1. Introduction

4.5 The present corroboration rules apply to the testimony of two categories of witness - namely, accomplices of the accused and complainants in trials for sexual offences. The rules apply peremptorily to every witness within these categories: the judge cannot exercise discretion on the basis of the particular facts or the characteristics of the particular witness.

4.6 The recent Court of Appeal decision in Chance,[13] in which it was held that the corroboration rule no longer

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10. The Criminal Law Revision Committee considered this to be a special case and, for that reason, made no recommendation: Eleventh Report (1972), "Evidence (General)", Cmnd. 4991, pp. 115-116, para. 193. For convenience we shall refer to the Committee and to this Report as the "CLRC".

11. See para. 2.7 above.

12. Save that in trials for the specified offences under the 1956 Act the judge is under an obligation not merely to warn the jury of the danger of convicting in the absence of corroboration; he must direct an acquittal, even if the jury believe the evidence requiring corroboration.

13. [1988] QB 932; see para. 2.11 above.

applies to complainants' evidence in sexual offences where the issue is identification, constitutes in our view a significant development for the purpose of evaluating the rationale of the rule. It is a necessary inference from this new approach that complainants in sexual cases are no longer regarded by the judges as a category of witness whose testimony is necessarily suspect; and it prompts the question whether the evidence of such witnesses should continue to be automatically regarded as unreliable in relation to issues other than identification (for example, consent in a trial for rape).

4.7 The present corroboration rules are thus subject to recurring criticism on two different grounds. First, the rules themselves, and the structure of law and practice that they now incorporate, impose on the courts an excessively complicated and over-elaborate duty, and are inappropriate for the task that they are supposed to perform of protecting the accused from the danger of the jury's being misled by unreliable evidence. Second, irrespective of the detailed content of those rules, it is questioned whether the two categories of evidence to which they now apply (namely, accomplice evidence and the evidence of complainants in sexual cases) have such particular chacteristics that the trial judge should be obliged to apply the rules to every case falling within those categories, without regard to his judgement of the actual needs of the case or of the reliability of the particular witness or evidence.

4.8 In this section we indicate our opinion on these two issues. Our provisional conclusions, on which we invite comment, are as follows.

4.9 First, as to the content of the present rules, we conclude that those rules are unsatisfactory in so many respects that they should be abolished. Our criticisms (which to some extent overlap) are that the rules are unduly

inflexible; that they are unduly complex, to the extent of making it extremely difficult for the judge to give the jury proper help in his summing up; that they produce a substantial number of anomalies; and that in some cases, far from achieving their object of providing additional protection for the accused, the present detailed corroboration rules may operate to his detriment. We deal with these various considerations in sections 2-5 below.

4.10 Second, as to the application of the corroboration rules, we consider that, in respect neither of the evidence of accomplices nor of the evidence of complainants in sexual cases, is there any justification for treating the evidence of all persons falling within those categories in exactly the same way, as the law at present requires. We deal with those considerations in section 6.[14] We then, in Part V of this paper, go on to raise the issue of whether, if the present technical rules on corroboration are abolished, there should nonetheless be some rules of law controlling the way in which trial judges handle certain categories of evidence, including evidence that at present falls within the present law of corroboration.

2. The rigidity of the corroboration rules

4.11 In <u>every</u> case that falls within one of the corroboration categories, the jury must be warned (in terms or in effect) that it is <u>dangerous</u> to convict in the absence of corroboration.[15]

4.12 We agree with the view expressed to the CLRC by many lawyers on consultation that the obligation to give a

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14. Paras. 4.25-4.38 below.

15. See para. 2.3 above.

warning fails to take into account that in the circumstances of some cases corroboration may not be important.[16] Thus, the rationale of the need for a warning in relation to an accomplice's evidence is the danger that he might give false evidence in order to minimise his own part in the alleged offence or out of spite.[17] In particular cases, however, it may be obvious that he has no ill-feeling against the accused and that he is repentant and anxious to tell the truth about his part in the offence; yet the judge is bound to give a corroboration warning to the jury.[18]

4.13 This approach is reflected in the following general observations about the corroboration warning which were made recently by the Court of Appeal itself -

> "The aim of any direction to a jury must be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. This involves the necessity of the judge tailoring his direction to the facts of the particular case. If he is required to apply rigid rules, there will inevitably be occasions when the direction will be inappropriate to the facts. Juries are quick to spot such anomalies, and will understandably view the anomaly, and often, as a result, the rest of the directions, with suspicion, thus undermining the judge's purpose. Directions on corroboration are particularly subject to this danger ... ."[19]

4.14 We agree, further, with the CLRC's conclusion that the rule whereby the evidence of one accomplice cannot corroborate that of another is unjustifiable. As the CLRC explained -

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16. p. 108-109, para. 179.

17. See Part 1 of Appendix A to this paper.

18. CLRC, pp. 110-111, para. 183.

19. Chance [1988] QB 932, 941G-942A.

> "Where the witness whose evidence is to be corroborated (A) and the suggested corroborating witness (B) are both accomplices, and both, acting independently of each other, tell the same story with consistent details and are unshaken in cross-examination, it seems extraordinary that B's evidence should not be capable of corroborating A's; and it is still more extraordinary if a third accomplice gives similar evidence."[20]

3. The complexity of the corroboration rules

4.15 The complexity of the present rules produces difficulties both for judges and for juries. In Hester, Lord Diplock observed that the "complicated formulae about the concept of corroboration and the respective functions of judge and jury are ... unintelligible to the ordinary laymen";[21] and, he suggested,[22] the jury in that case had been "bewildered" by the trial judge's summing up - which had accorded with common practice[23] and had accurately expounded the law. And more recently, in Spencer,[24] May LJ (delivering the judgment of the Court of Appeal) remarked that it was

> "... our combined experience, both from sitting at first instance and also in this court, that where the full warning has to be given as a matter of law it is very difficult to direct the jury in terms which they can clearly understand, particularly when one has to go on and direct them about which part of the other evidence can or cannot be considered to be corroborative."

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20. CLRC, p. 116, para. 194. The CLRC recommended abolition of this rule: ibid., and draft Bill, p. 184, clause 19(1).

21. Hester [1973] AC 296, 328C.

22. Ibid., at p. 329F.

23. [1973] AC 296, 328E.

24. [1985] QB 771, 786A-B.

4.16 The CLRC, too, pointed out that the existing rules led to many mistaken rulings at trials and hence to the quashing of convictions on appeal.[25] They instanced the technical rules governing what may and may not constitute corroboration,[26] and who is an accomplice; and went on to analyse the case in which the trial judge wrongly directed the jury that an item of evidence was capable of providing corroboration -

> "Clearly the conviction would have to be quashed if corroboration was required by statute and there was no other corroboration; but it may have to be quashed even in a case where only a warning was necessary, notwithstanding the fact that it was open to the jury to convict in the absence of corroboration. The conviction might have to be quashed in such a case (i) because the judge erroneously took the view that the evidence was capable of being corroboration, and therefore omitted to give the warning or (ii) because, even if the judge gave the warning out of caution, the Court of Appeal considered that the jury might have found that the evidence was corroboration, when in fact it was not, and so have thought that the danger referred to did not exist. This is the situation even if there is plenty of other evidence, because the verdict will not show whether

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25. As to the incidence of appeals, we have conducted a survey of the transcripts of the 373 judgments of the Court of Appeal in appeals against conviction delivered in the twelve-month period from 1 May 1988. None of these appeals was merely frivolous, since all were brought with leave of either the single judge or the full court. The survey revealed that corroboration was an issue, sometimes amongst others, in 56 cases (a proportion of about 2 in 13).

26. The rules are set out in paras. 2.15-2.27 above. In Vetrovec (1982) 136 DLR (3d) 89 (considered below, in paras. 2.14-2.16 of Appendix B), the Supreme Court of Canada strongly criticised the definition of corroboration laid down in Baskerville (para. 2.20 above) on the grounds that the definition was unduly restrictive and put an onerous duty on the judge to sift through the available evidence in search of evidence capable of being corroborative.

> the jury accepted the other evidence or convicted on the strength of the uncorroborated evidence. The strictness of the present law ... has often caused judges, out of caution, to follow too closely in their summing up the wording of the enactment requiring corroboration or the words used in a judgment; and as a result the jury may be confused or even get the impression that the judge intends to convey to them that they should not convict unless the evidence achieves moral certainty as distinct from proof beyond reasonable doubt."[27]

4.17 The CLRC also referred to comments made on consultation about the rule that, on the one hand, the judge should warn the jury that it was dangerous to convict on uncorroborated evidence and, on the other, that he has to tell the jury that they may nevertheless do so.[28] From the accused's point of view (commentators had suggested), the direction was absurd since, having warned the jury that it was dangerous to convict, the judge must go on to remove much of the protection afforded by the rule by adding that nevertheless they could convict; but, conversely, the rule could irrationally impede the prosecution, because it enabled counsel for the accused to urge on the jury the injustice of doing something that the judge is about to tell them is dangerous.

4. The corroboration rules produce anomalies

4.18 We would instance some anomalies to which the present rules give rise.[29] The first is that a full corroboration warning (as distinguished from a warning of a

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27. CLRC, p. 109, para. 180.

28. pp. 109-110, para. 181.

29. See also the passage cited at para. 2.11 above from the judgment of the Court of Appeal in Chance [1988] QB 932.

special need for caution[30]) need not be given where an accomplice of the accused gives evidence on his own behalf that incriminates the accused, whereas such warning must be given if the accomplice is a prosecution witness.

4.19 Anomalies may arise, secondly, from the meaning of the term "sexual offence". In Simmons,[31] for example, the accused (a professional tarot reader) was charged with false imprisonment; his victim, having come to his flat in response to an advertisement offering a tarot reading, was driven to lock herself in the bathroom in order to avoid his unwanted sexual attentions. The Court of Appeal rejected the accused's argument that the offence was sexual (and that, accordingly, a full corroboration warning should have been given).[32]

4.20 A further anomaly is that a corroboration warning is required in respect of the evidence of an accomplice only if he takes part in the same crime as the accused;[33] should he be an accomplice to a lesser, associated offence committed on the same occasion, the rule does not apply.

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30. Para. 2.33 above.

31. [1987] Crim LR 630.

32. Delivering the court's judgment, Watkins LJ stated -

> "We perceive considerable danger in an unwarranted extension of the three categories [under the corroboration rules] and think that any suggested extension should be treated very circumspectly. We do not accept that this was a sexual case in which the conventional warning should have been given to the jury. The offence charged was false imprisonment. If it was accompanied by some kind of sexual activity on the part of the appellant its nature was not such as to bring about the effect contended for on behalf of the appellant": (Transcript No. 8/C1/87, at p. 12).

33. Davies [1954] AC 278; see para. 2.12 above.

4.21 In the case of a sexual offence in which consent is in issue, evidence both of the fact that a complaint was made by the alleged victim shortly after the offence, and of the substance of the complaint, is admissible as showing the consistency of her conduct with her testimony and, where consent is in issue, as being inconsistent with consent. Nevertheless, a complaint of this kind cannot amount to corroboration.[34] Thus, when consent is in issue, the judge should tell the jury that, on the one hand, they may regard the complaint as supporting the complainant's testimony but that, on the other hand, it is not open to them to treat the complaint as corroboration (in its legal sense). This, it seems to us, is not only anomalous[35] but also another example of the burdensome task that the rules impose on the jury.

4.22 Finally, bearing in mind that the corroboration rules apply to summary trials as well as those on indictment, many might agree with one commentator's suggestion that it is

> "somewhat odd to require a magistrate to reason as follows on a charge of indecent assault brought by a respectable middle-aged female: 'I believe her evidence, but I must think twice before acting upon it because sex is a mysterious thing', whereas, on a charge for assault brought by a man with numerous convictions for violence, the magistrate can simply say to himself 'I believe his evidence and I need not think twice about acting upon it because there is no particular danger that charges of violence will be made on account of neurosis, jealousy, fantasy or spite'."[36]

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34. See para. 2.19 above.

35. It has been suggested with some force, in relation to cases where consent is in issue, that "since the complainant denies consent it cannot be said that the complaint is not admitted as evidence of facts stated therein": Zuckerman, The Principles of Criminal Evidence (1989), p. 162.

36. Cross on Evidence, 6th ed. (1985), p. 237.

5. The corroboration rules may operate to the detriment of the accused

4.23 The corroboration rules are intended to operate for the benefit of the accused. However, Lord Diplock explained in Hester[37] that

> "... to incorporate in the summing up a general disquisition upon the law of corroboration in the sort of language used by lawyers may make the summing up immune to appeal upon a point of law, but it is calculated to confuse a jury of laymen and, if it does not pass so far over their heads that when they reach the jury room they simply rely upon their native common sense, may, I believe, as respects the weight to be attached to evidence requiring corroboration, have the contrary effect to a sensible warning couched in ordinary language directed to the facts of the particular case."

4.24 A similar point has been made by the Supreme Court of Canada, who suggested that "the accused was in the unhappy position" of hearing the judge draw particular attention to the testimony to be corroborated, so that cogent prejudicial evidence was repeated and thus, however undesignedly, highlighted.[38]

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37. [1973] AC 296, 327G-328A.

38. Vetrovec (1982) 136 DLR (3d) 89, 95. Research by the London School of Economics Jury Project team suggested that a formal corroboration warning may have adverse consequences for the accused: in a limited experiment involving mock jury trials of a defendant on a rape charge, the results suggested that jurors were more willing to convict where the judge gave the warning than where he gave none: [1973] Crim LR 208.

6. The categories of evidence to which the corroboration rules apply

4.25 In this section we review the two categories of evidence to which the corroboration rules now apply, and consider whether there is any justification for the present rule that all evidence falling within either of those categories should be the subject of a compulsory warning.

(a) Accomplices

(i) The origins of the rule

4.26 The origins of the requirement of a corroboration warning in the case of accomplices are considered in Part 1 of Appendix A to this paper. As we point out there,[39] the rule was originally justified as a counterweight to the practice of offering rewards to accomplices who testified, and as that practice diminished, the justification for a rule applying indifferently to all cases of accomplices disappeared.

(ii) The views of the CLRC

4.27 The CLRC, after reviewing the rule in some detail, concluded that it was unjustifiable and should be abolished.[40]

4.28 The CLRC set out[41] an oft-cited passage from a book published as long ago as 1836,[42] which attacked the rule as being "a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath".

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39. Paras. 2-4.

40. pp. 110-112, paras. 183-185.

41. p. 111, para. 184.

42. Henry Joy (Lord Chief Baron of the Court of Exchequer in Ireland), On the Evidence of Accomplices.

The author observed that it was difficult to understand why, like every other witness "of whose credit there is an impeachment", the testimony of an accomplice was not left to the discretion of the judge to deal with according to the circumstances of the particular case. The view that the present requirement was "wholly wrong", the CLRC added, was in accordance with the great majority of those who had replied in 1968 to its request for observations.

4.29 The CLRC cited[43] the following comments submitted by one judge -

> "Some accomplices clearly have the strongest motives for casting all or most of the blame on the accused, others have no motive for lying. It has always seemed to me that to give the required warning as regards the accomplice in the second class is wholly unnecessary and unfair to the accomplice ... In such cases I have given the warning required, but have gone on to point out that what weight the jury attach to such a warning is for them and that they will probably want to consider on the facts of the case they are trying whether the accomplice has any motive at all for lying."[44]

(iii) Our conclusion

4.30 Like the CLRC, whose reasoning we find convincing, we have concluded that there is no justification for a rule that requires a trial judge to treat all cases of accomplice

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43. At p. 111, para. 184.

44. In our view, this comment well encapsulates the artificiality of the corroboration rules. If in practice judges are constrained to place emphasis not upon the danger of convicting upon uncorroborated evidence, but simply upon the cardinal principle of every criminal trial - namely, that the assessment of the reliability and weight of the evidence is for the jury, then the previous compulsory recitation of the corroboration formulas can only be a source of confusion.

evidence in exactly the same way.

(b) Sexual offences[45]

(i) The views of the CLRC

4.31 The CLRC, by a majority, concluded that the corroboration rule should be retained for sexual offences.[46] They gave three reasons for this conclusion. First, they suggested

> "In sexual cases [there] is the danger that the complainant may have made a false accusation owing to sexual neurosis, jealousy, fantasy, spite or a girl's refusal to admit that she consented to an act of which she is now ashamed."[47]

There are, however, a number of difficulties about this ground. First, we are not aware of empirical evidence (as distinguished from oft-repeated assertion[48]) that the danger

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45. The origins of the rule in relation to sexual offences are considered in Part 2 of Appendix A to this paper.

46. The CLRC proposed that the existing rule that a child's unsworn evidence was subject to a statutory corroboration requirement should be retained where the child was the complainant in a sexual offence. The CLRC also proposed a general change to the existing corroboration rule - namely, that the judge should be required to warn not that it would be dangerous to convict in the absence of corroboration, but that in the absence of corroboration there was a special need for caution before convicting; and that the judge should not be required to use any particular form of words in giving such caution: CLRC, pp. 113-114, para. 188; draft Bill, clause 17, pp. 183-184 and clause 20(2), p. 185.

47. CLRC, p. 113, para. 186.

48. The view held by many, that judicial experience had shown over many years that a child's unsupported evidence was unreliable, did not deter Parliament from removing (by s. 34 of the Criminal Justice Act 1988) the category of children's evidence from the ambit of the corroboration rules.

is likely to exist for no reason other than that the offence is "sexual" in character.[49] Secondly, if the rule rests upon assumptions concerning the characteristics of females in general, we do not regard that as a justifiable basis. Thirdly, moreover, if that view is relied on as a basis for the present rule, such reliance is misplaced, because the rule applies to male, as well as female, complainants.

4.32 Second, the CLRC expressed the view that, in the case of an accomplice, any special danger that there may be in relying on the witness's evidence is apparent from the fact that he is an accomplice, or can readily be made apparent by the defence; whereas (the CLRC went on) in the case of a sexual offence the danger may be hidden. While this may be a cogent reason for not applying the rule to accomplice evidence, we find it less easy to accept its validity as a reason for the application of the corroboration rule in all sexual cases. The force of the CLRC's argument is, moreover, impaired by the fact that in 1986 Lord Ackner[50] considered that the same argument would justify a distinction between all the (then) three categories of case, including accomplices,[51] in which a corroboration warning was required and those in which, though some kind of warning should be given to the jury, a "full" corroboration warning was not needed.[52]

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49. We have criticised, at para. 4.19 above, the basis on which offences are categorised as "sexual".

50. In Spencer [1987] AC 128, 141F-H.

51. The other categories were complainants in sexual offences and (until section 34 of the Criminal Justice Act 1988 came into force) children who gave sworn evidence.

52. Paras. 2.33-2.37 above.

4.33 The CLRC observed (thirdly) that the nature of such evidence may make the jury too sympathetic to the complainant and so prejudice them against the accused. We find the logic of this argument somewhat difficult to follow, since, on the one hand the complainant's evidence is not of that character in every trial for a sexual offence, and, on the other hand, there may well be other cases (especially, perhaps, where the accused is charged with a non-sexual crime of violence) in which this factor is present but to which, nevertheless, the corroboration rule does not apply.

(ii) The recommendation of the Advisory Group on Video Evidence

4.34 In its Report, published in December 1989, the Advisory Group on Video Evidence reviewed, and cogently criticised, the present corroboration rules, concluding that, unless they were changed, the Group's recommendations for facilitating the testimony of children and other vulnerable witnesses might have a much more limited effect than was intended.[53] The Group went on to recommend the abolition, without replacement, of the present common law corroboration rules relating to the evidence of complainants (whether child or adult) in sexual offences.[54]

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53. See paras. 3.13-3.14 above. The Advisory Group pointed out, at para. 5.25, that many witnesses most likely to benefit from its proposals would be the victims of sexual offences, who "cannot usually be corroborated", and continued: "It would be questionable in principle and undesirable in practice to introduce quite radical measures for facilitating their evidence, if, once admitted, it were to continue to be invariably characterised as 'dangerous' by judges."

54. The relevant parts of the Group's report appear as Appendix C to this paper.

(iii) Other considerations

4.35 One ground on which the mandatory warning might be justified is that an allegation of the commission of a sexual offence is peculiarly easy to make and peculiarly difficult to refute. However, this does not apply to every charge of a sexual offence; and even as regards cases in which the circumstances are of that kind, we do not see why charges of sexual offences should be "significantly more difficult to answer than charges of other offences committed in private and which leave no trace of their occurrence".[55]

4.36 The present approach has been criticised by academic commentators[56] on the ground that the rule is not only unnecessary and unduly formal, but also positively undesirable in that the recital by the judge of the reasons for the existence of the rule in sexual cases[57] is insulting to women in general, and to complainants in particular, when those reasons are not based on demonstrated fact, and irrespective of the particular facts of the case. The obligation on the judge to use language demanded by the corroboration rule has also been criticised by lay commentators, and although such criticism may be unfair towards the particular judge involved, whose task is to act in accordance with the law, they are difficult to answer as

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55. Dennis, "Corroboration Requirements Reconsidered", [1984] Crim LR 316, 327.

56. e.g., Temkin, Rape and the Legal Process (1987), pp. 133-137, under the heading "The Corroboration Warning - 'A Lingering Insult' to Women"; she suggests (at p. 141) that the requirement of a warning in sexual cases "owes its existence to misogynistic fantasy". A similar view has been expressed by at least one court in another jurisdiction: see the comments of Judge Armand Arabian of California cited in para. 5.7 of Appendix B below.

57. See para. 2.10 above.

a comment on the rule itself. Thus, after the trial of a particularly disgraceful rape, during which the judge appears to have said no more in relation to the complainant's evidence than to use the common form of warning, The Independent commented in a leading article -

> "The penalty was imposed primarily as a result of evidence provided by the victim and in spite of the tenor of the earlier summing-up by the judge who had told the jury that it was dangerous to convict on the evidence of an alleged victim alone. Moreover [the trial judge] had spoken of the temptation on the part of women to `exaggerate or fabricate' when questions of sexual misconduct were involved. He did not apparently find it necessary to explain the reasons for this sexist-sounding conclusion."[58]

4.37 It may also be the case (and this is a matter on which we should particularly welcome comment) that the prospect of the recitation by the judge of the corroboration warning, and its possible effect upon the jury, operates as an additional deterrent to the prosecution of complaints by female victims of sexual crimes, notably rape - additional, that is, to other factors. Those deterrent factors, which many commentators regard as formidable, have been expounded[59] as follows -

> "It may not generally be appreciated that once a woman sets in train a complaint that she has been raped, she has to undergo a prolonged ordeal. In the first place there will be a police interrogation, one of the purposes of which is to ensure, as far as possible, that she is not making a false charge; indeed unfounded allegations are often cleared up at this stage. Next she has to answer further questioning by the police surgeon ... and to undergo a thorough as well as an intimate and inevitably distasteful gynaecological examination. Furthermore, if her story of the rape

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58. The Independent, 13 October 1989, p.18.

59. In the Report of an Advisory Group on the Law of Rape chaired by Mrs Justice Heilbron (1975), Cmnd. 6352, at paras. 88-89.

> is true she will, at this stage, probably be in a state of shock and possibly also have suffered painful injuries; yet she may have to spend many hours at the police station before she is able to return home.
>
> "At the trial, which will take place some considerable time later, she has to relive the whole unpleasant and traumatic experience. In many cases she will be cross-examined at length. ... ."[60]

4.38 Our provisional view is, therefore, that the arguments of the CLRC in favour of retaining mandatory rules applying to all complainants in sexual cases are not made out.

7. Our conclusion

4.39 We have therefore concluded that both the detailed structure of the present corroboration rules, and the law governing the categories of cases to which those rules are applied, are unsatisfactory in so many respects that there is no alternative to abolishing the present law. That is our first and main provisional proposal.

4.40 It does not follow, however, that there should be no rules as to the way in which judges handle, and direct juries about, certain types of evidence. The Court of Appeal has recently observed that the corroboration rules have evolved from long experience in order to serve the interests of justice.[61] Whilst we respectfully suggest that

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60. We should be grateful for comments on the extent to which in practice the corroboration rules deter victims of sexual offences from coming forward or assisting in the apprehension or prosecution of their assailants. We list at paras. 6.3-6.4 below all the specific matters on which comments are invited.

61. Willoughby (1988) 88 Cr App R 91, 96.

the Court was not intending to assert that the present rules in all their detail are necessary to serve that purpose, there is no doubt that the basic origin of the rules is a widely held belief that the interests of the accused do, or at least may, require certain kinds of evidence to be specially treated. We have also seen[62] that the courts have recently developed further, albeit more flexible, rules to govern the treatment of other types of doubtful evidence that fall outside the categories for which the corroboration rules have been developed.

4.41 In Part V of this paper, therefore, we consider whether, even if the present corroboration rules are abolished, there should be introduced other and less rigid rules governing not only the types of evidence to which the corroboration rules apply at present but also other categories of possibly suspect evidence.

D. OUR PROVISIONAL PROPOSALS

4.42 We provisionally propose that -

(1) The present common law rules, by which the judge is automatically obliged to warn the jury that it would be dangerous to convict the accused on the uncorroborated evidence of a prosecution witness who is (i) an accomplice of the accused or (ii) the complainant in a trial for a sexual offence, should be abolished.

(2) The statutory requirement of corroboration relating to procuration offences under the Sexual Offences Act 1956 should be abolished.

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62. Paras. 2.33-2.37 above.

4.43 These proposals require us to consider further how the law should develop if the present law on corroboration was indeed abolished. There appear to us to be two broad possibilities: first, that the present rules should be abolished without replacement; second, that some other and different rules should be provided by legislation to deal with categories of doubtful evidence. In Part V we discuss and invite views on these questions.

PART V

SHOULD THERE BE RULES RELATING TO PARTICULAR CATEGORIES OF EVIDENCE?

A. INTRODUCTION

5.1 As we indicated in paragraph 4.43 above, we consider in this Part of the working paper whether, on the assumption that our provisional proposals[1] for the abolition of the present corroboration rules are implemented, any rules should be laid down for the purpose of controlling or guiding juries in assessing particular categories of evidence; and if so, what should be the form taken by such rules, and to what types of evidence the rules should apply.

5.2 In paragraph 6.4 below, for the purpose of focusing comment, we list specific questions on which comment is invited. The list is not intended to be exhaustive: we should welcome views on any issue, whether or not it appears in the list, that arises from this working paper. We would emphasise the importance that we attach to the views, in particular, of those concerned with the practical working of the law in assisting our consideration of what, if any, legislative rules should replace the present corroboration rules.

B. ABOLITION WITHOUT REPLACEMENT

5.3 The principal argument in favour of providing no special rules is that the interests of justice are best served by leaving judges free to tailor their directions to the jury to the circumstances of the particular case. This approach would appear to have a number of attractions. The

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1. See para. 4.42 above.

trial judge would be under an obligation to warn the jury to proceed with caution in relation to suspect testimony,[2] but he would not be fettered by the technical rules with which the law of corroboration has become encrusted; in particular, he would have discretion as to the terms in which any warning was expressed.[3]

5.4 Moreover, the discretion of the trial judge would be subject to review in this, as in other areas, by the appellate courts. In Turnbull[4] the Court of Appeal said of its jurisdiction:

> "It is for the jury in each case to decide which witnesses should be believed. On matters of credibility this court will only interfere in three circumstances: first, if the jury has been misdirected as to how to assess the evidence; secondly, if there has been no direction at all when there should have been one; and thirdly, if on the whole of the evidence the jury must have taken a perverse view of a witness, but this is rare."[5]

In the light of this approach, the Court of Appeal would appear to have ample latitude to intervene if it should take the view that a trial judge has not given the warning that justice demands in the circumstances of the particular case.

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2. The common law rule was described in Beck [1982] 1 WLR 461, 469A as "the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive." To that was added in Spencer [1987] AC 128, 142A, a recognition of the need, agreed by both sides in that case, to give a warning in cases of "potential unreliability". See paras. 2.33-2.37 above.

3. Knowlden (1981) 77 Cr App R 94, 100-101. It may also be noted that the abolition of the corroboration rules would automatically resolve the possible difficulty to which the decision of the House of Lords in Spencer [1987] AC 128 gives rise.

4. [1977] QB 224.

5. [1977] QB 224, 231D.

5.5 It should be borne in mind, too, that when, in 1988, Parliament removed one category of evidence - namely, testimony given by a child - from the ambit of the corroboration rules, no replacement for those rules was considered necessary.[6]

5.6 There is, however, a substantial case against leaving the law solely to judicial development. Legislation that did no more than implement our provisional proposals would fail to make clear to the courts whether or not, despite the abrogation of a corroboration requirement, Parliament intended evidence at present subject to corroboration rules to be treated, as a category, as potentially suspect. It might be thought that in principle this omission would render the legislation deficient; and that, as a matter of practice, mere abolition of the corroboration rules would leave trial judges bereft of guidance on whether and, if so to what extent, they should warn the jury of the need for caution in cases at present within the corroboration rules.

5.7 A specific aspect of this argument is that abolition, without more, might result in a significant increase in the number of appeals. In the absence of legislative rules defendants would have greater scope to argue that the judge had failed to give adequate warning to the jury about suspect testimony, particularly in respect of evidence that had been previously subject to specific rules in the interests of the accused. Appellate courts would then have the burden of deciding whether to formulate new

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6. Criminal Justice Act 1988, s. 34(1) (unsworn evidence) and s. 34(2) (sworn evidence). The section does not apply to the evidence of child complainants in trials for sexual offences.

rules in place of the old,[7] or whether, on the other hand, in effect no guidance should be given to trial judges. Decisions on such issues, it can be argued, should not be left solely to the courts, without legislative guidance.

5.8 In order to explore this question we now suggest some possible legislative models. We invite comment both on whether there should be any such legislative rules and, if so, on what those rules should be.

C. POSSIBLE LEGISLATIVE RULES

5.9 Purely as a starting-point for discussion, we shall refer to proposals made by the Australian Law Reform Commission (the "ALRC") in 1987,[8] which are outlined in paragraphs 3.11-3.13 of Appendix 2 to this paper. We consider first the nature of the obligations imposed upon the judge by the proposals.

5.10 The ALRC suggests that legislation to implement its proposed rules for dealing with categories of doubtful evidence[9] should be in the following terms -

> "(2) Where there is a jury and a party so requests, the Judge shall, unless there are good reasons for not doing so -

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7. Notwithstanding that the Court of Appeal has stated that it would not wish to fetter the discretion of the trial judge as to the exact terms in which the jury should be warned: see, e.g., Knowlden (1981) 77 Cr App R 94, 100-101.

8. By contrast with our provisional proposals, the Australian proposals, which are outlined in paras. 3.11-3.13 of Appendix 2 to this paper, were made in the context of a general review of the law of evidence.

9. For the categories of evidence to which the ALRC proposals apply, see para. 5.19 below.

(a) warn the jury that the evidence may be unreliable;

(b) inform the jury of the matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

"(3) It is not necessary that a particular form of words be used in giving the warning or information.

"(4) This does not affect any other power of the Judge to give a warning to, or to inform, the jury."[10]

5.11 It will be noted that this approach does not place the judge under any absolute obligation to give a warning in respect of any type or category of evidence, nor does it specify the terms in which such a warning should be given. We should find it very helpful to have views on whether judges should be under such obligations in respect of any, and if so what, categories of evidence. The ALRC scheme incorporates a number of comparatively novel features, and we invite comment on whether they would be suitable for introduction in this country. Those features of the scheme are as follows.

5.12 First, it requires the court to make a specific decision on whether any, and if so what, guidance the jury requires in respect of evidence that experience suggests presents special problems. The ALRC report limits this obligation to cases where a direction is requested by a party, but it is for consideration whether it might be valuable to oblige the court to require submissions, albeit in some cases of a very brief nature, in all cases that fell within the specified categories. An obligation to discuss with counsel the evidential implications of certain

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10. This formulation would require adaptation if applied in magistrates' courts.

categories of testimony, without however binding the judge as to how that evidence shall be handled, may be a valuable way of retaining the trial judge's discretion whilst ensuring that the problems of particular types of evidence are not overlooked; and of ensuring that the judge's exercise of that discretion is properly considered at the trial and, so far as possible, agreed.[11]

5.13 Second, some may see it as a valuable feature that in cases that have been identified as characteristically requiring special treatment the judge is required to give reasons for not giving a warning.

5.14 Third, it may be thought desirable that the judge should be obliged to tell the jury why he is giving a warning, rather than being permitted simply to tell them of "a special need for caution", or some similar non-specific phrase. It would appear that the latter solution has been

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11. It is of interest that the Court of Appeal has recently indicated that in cases where the present corroboration rules have to be applied the judge should formally seek the assistance of counsel in formulating the terms of his summing up, whether or not counsel takes an initiative in the matter. "... the judge would have been assisted by submissions from counsel, in the course of which there would have been explored ... both aspects of the matter, namely, (i) what were the ingredients of the offences in respect of which the jury should be told to look for corroboration and (ii) what evidence was there capable of amounting to corroboration. In almost all cases where a direction on corroboration is required, it is desirable that the judge should, at the conclusion of the evidence, hear submissions from counsel - they will often be very brief - on these two important matters": Ensor [1989] 1 WLR 497, 505G-H. In such a case the judge will be seeking submissions on complex rules of law, rather than on how he should exercise a discretion. Nonetheless, the same basic principle applies, of formal review of evidential issues before embarking on the summing-up. It is also of interest that in New Zealand legislation requires the judge in certain cases formally to consider whether to give a warning: see para. 4.5 of Appendix B below.

adopted in at least one other jurisdiction,[12] and on one view might be thought sufficient to put the jury "on guard". However, a jury so directed would lack any guidance as to the particular aspects of the evidence in respect of which they should be cautious, or as to what type of evidence, or what type of conclusion on their part, would suffice to discharge their duty of caution. While these issues are ultimately for the jury, the present format of a criminal trial requires the jury to be given explicit and helpful guidance by the judge on evidential issues. A warning that restricted itself to speaking of a special need for caution might be thought not to fulfil this requirement.

5.15 Fourth, however, the adoption of such a scheme would respect the judgement of the trial judge in assessing the real nature and reliability of particular items of evidence, and in determining the nature of the guidance that the jury required in respect of it. It would be for the trial judge to consider whether a warning was appropriate, taking into account all relevant factors, including his judgement and experience of the difficulties attaching to particular types of evidence. He would, however, be free, and be expected, to exercise his judgement as to the terms in which any such warning should be expressed, and as to the emphasis that should be placed on such considerations when discussing the evidence and demeanour of a particular witness.

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12. See the New Zealand provision set out at para. 4.5 of Appendix B to this paper. Similarly, the proposals of the Canadian Federal/Provincial Task Force (see para. 2.4 of Appendix B to this paper) do not appear to require the judge to explain why caution is necessary in any given case. The "Turnbull" direction on identification evidence (para. 3.7 above), however, requires the judge both to warn the jury as to a "special need for caution" and to tell them why that caution is required: Turnbull [1977] QB 224, 228C.

5.16 Such decisions by the judge, although discretionary, would be subject to appellate control. However, we would expect the appellate courts, in reviewing a statute that expressly conferred on the trial judge the margin of judgement that we envisage, to give very great weight to his exercise of that judgement in the particular circumstances of the case. Moreover, we have in mind that the judge might be assisted at the trial by formal submissions concerning the exercise of his discretion.[13] Such a process should clarify the aspects of the evidence that are genuinely in dispute, and thus avoid unnecessary appeals. We do not therefore envisage that such a system would require, or would engender, a substantial number of appeals.

5.17 In any such system it would be necessary to provide some guidance as to the categories of evidence to which the rules apply. It is not enough to leave that matter to the discretion of the trial judge, since he is already free to give such warning as he thinks fit in respect of any of the evidence. The purpose of any legislative rules must be to reinforce that protection for the accused by requiring the judge to exercise, or to consider exercising, his power to warn in respect of certain types of evidence that have been identified as capable of posing specific problems. It is, however, difficult to formulate a definitive list of the types of evidence that should be subject to special provisions.

5.18 We should, first, welcome comments on whether any such legislative rules should be applied to the categories at present governed by the corroboration rules. We seek comment, secondly, on whether the opportunity should be taken of putting on a more formal footing the recognition of

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13. See para. 5.12 above.

the need for special treatment of other types of evidence that has become apparent in recent years.[14] We are inclined to think that a system that did not suffer from the artificiality and limiting nature of the present corroboration rules might with advantage be applied more widely than the present law on corroboration, but we seek comment on the point.

5.19 The ALRC proposed that cases in which special rules should apply should include -

(a) evidence the reliability of which may be affected by age, ill-health (whether physical or mental), injury or the like;

(b) evidence given by a witness called by the prosecutor, being a person who might reasonably be supposed to have been concerned in the events giving rise to the proceedings;

(c) in the case of a prosecution for an offence of a sexual nature, evidence given by a victim of the alleged offence.[15]

5.20 These are merely broad indications of possible categories, and might in some respects be thought to be too widely expressed (for instance, category (b) might be read as including the victim of any offence). They also do not

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14. See paras. 2.33-2.37 above.

15. The ALRC proposals apply also, in respect of evidence in criminal trials, to admissions and to identification evidence. As we explained in para. 1.2 above, we do not think it appropriate in this exercise to review the already detailed law on identification evidence; and any possible alteration in the law relating to admissions should, in our view, wait until the law on confession evidence has been reviewed, as indicated in para. 1.3 above. However, if something like the scheme discussed in the text were adopted for some or all of the classes of evidence discussed in this paper, it would thereafter be comparatively simple to add to the list of classes any other class of evidence that it was thought would benefit from similar treatment.

in terms extend to the case in which "there is material to suggest that a witness's evidence may be tainted by an improper motive", even though that category of evidence has been identified by English courts as requiring special attention.[16] Therefore, rather than speculate further on the systems in other jurisdictions, we put forward for comment the following list of possible categories:

(a) evidence the reliability of which may be affected by age,[17] ill-health (whether physical or mental), injury or the like;

(b) in the case of a prosecution for an offence of a sexual nature, evidence given by the victim of the alleged offence;[18]

(c) evidence by any person who has given material assistance or encouragement to the accused in the commission of the offence charged or of any other offence adduced in evidence against him;[19]

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16. Beck [1982] 1 WLR 461, 469A.

17. The corroboration rules that at one time applied to children's evidence were abolished by s. 34 of the Criminal Justice Act 1988: see n. 4, Part II above. We do not seek to review that decision. However, we should be interested to receive comment on the question whether, if a different scheme (such as the one outlined here), not based on corroboration, was to be introduced, one category of evidence within it should be evidence that might be unreliable because of the witness's youth.

18. We have indicated in Part IV above the objections that we see to the use of this category in relation to the present corroboration rules. We should welcome comment on the extent to which those objections are considered to apply to the inclusion of this category in the different scheme discussed here.

19. This formulation, which can no doubt be improved on, is intended (a) to avoid the technicalities of the law of

(d) evidence in respect of which there is material to suggest that[20] it may be tainted by an improper motive.

5.21 We accept that some of the foregoing categories may be difficult of definition, or may be expressed in unusually wide terms: "tainted by an improper motive" might be thought to be an example.[21] However, it should be remembered that the purpose of these formulations is to identify cases in which the judge has to decide whether or not to exercise his discretion. That a particular case arguably falls within a widely drawn category will not mean that the judge has to, or will in fact, give a warning in that case.

5.22 We would also envisage that the legislative specification of categories of case for special consideration would not entail the abolition of the existing general discretion of the judge to make any comment that he thinks fit in particular cases falling outside those categories. That residual protection for the accused might

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19. Continued
accomplices; and (b) to reach persons implicated in offences of which evidence is admissible under the similar fact rule. In New Zealand, legislation requires the judge, at a trial for any offence, to consider giving a warning to the jury on the need for special caution in any case where it appears to him that "a witness may have some purpose of his or her own to serve in giving evidence": see para. 4.5 of Appendix B below.

20. We suggest that this formulation, which was used by the court in Beck [1982] 1 WLR 461, 469A (see para. 2.35 above), is desirable to exclude mere speculation about the bona fides of a witness.

21. In New Zealand, however, legislation (see para. 4.5 of Appendix B) provides that the judge must consider giving a warning where "it appears to the Judge that a witness may have some purpose of his or her own to serve". The judge therefore controls the initial judgement as to whether the case falls into the category at all.

be thought to mitigate any concerns about the difficulties of formulating a definitive list of special categories of evidence.

5.23 In the foregoing exposition, we have assumed that the same rules would apply to all categories identified as requiring special treatment, and in particular that the same rules should apply to the categories of evidence at present subject to the corroboration rules as to other categories of suspect evidence. We have, however, made that assumption only for ease of exposition. As we indicate in paragraph 5.18 above, we invite comment on whether, in the case either of the evidence of an accomplice or that of a complainant in sexual offences, there should continue to be special rules differing from the law applying to other types of suspect evidence, and if so what form those rules should take.

5.24 We have also assumed that, as at present, any obligation to warn or otherwise to give special treatment to certain types of evidence should apply only in relation to evidence unfavourable to the accused. We should be interested to know if there are any who question that assumption.

D. SHOULD A WARNING BE PROHIBITED IN CERTAIN CASES?

5.25 This final question arises out of criticisms that have been made of the present corroboration rules relating to the evidence of female complainants in trials for sexual offences. It is: are there any categories of evidence as to which judges should be forbidden by statute to give any warning, or where warnings in certain terms should be forbidden?

5.26 Canadian legislation[22] provides, in relation to evidence in trials for certain sexual offences,[23] that -

> "no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration."

5.27 The argument in favour of introducing a similar provision into our law is that there is a danger that, notwithstanding the abolition of the present corroboration rule, judges in trials for sexual offences may be inclined automatically to warn the jury of the unreliability of complainants' evidence in such cases. Judges (the argument would run) have been trained for many years to regard the evidence of complainants, especially if female, as potentially suspect and to direct the jury accordingly; and the abolition of the mandatory corroboration rule may not suffice to counterbalance this deeply entrenched judicial attitude. As a result, statements that are regarded as offensive and productive of undesirable consequences[24] may continue to be made.

5.28 There are, however, countervailing considerations. First, it would seem wrong in principle to forbid the giving of a warning, or to limit the terms of any warning, in relation only to specific categories of witness: a logically coherent provision would prohibit the giving of a warning in respect of the testimony of <u>any</u> witness merely on the ground that he or she falls into a particular category

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22. See para. 2.8 of Appendix B to this paper.

23. Criminal Code, s. 246.4. The offences are: incest; gross indecency; sexual assault with a weapon, threats to a third party or causing bodily harm; and aggravated sexual assault.

24. See paras. 4.36-4.37 above.

(for example, of race or occupation). To select one or more types of witness for privileged treatment would appear undesirable. Then (second), it can be contended that justice towards the accused requires that the judge must in every case have a discretion to give such warning, if any, as he considers necessary in the circumstances of the particular case; he must, that is, be free to warn the jury about a particular complainant whose evidence there is good reason to believe to be unreliable.[25] Indeed, in non-sexual offences this proposition is not contested.

5.29 We should welcome comment on these issues. We shall also wish to consider whether it is necesary to deter the expression of assumptions about the characteristics of other categories of witness, for instance, young children. It is of interest that New Zealand has recently legislated in that sense. The legislation does not appear to prohibit all comment on a particular child's evidence, but it does prevent the judge from expressing assumptions about the evidence of children as a category.[26]

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25. In New Zealand the Evidence Law Reform Committee expressed the view in its Report on Corroboration (1984) that the Canadian provision set out in para. 5.26 above was "inflexible" and could lead to wrongful convictions: see further, para. 4.3 to Appendix B below.

26. Sect. 23H(c) of the Evidence Act 1908, inserted by the Evidence Amendment Act 1989, s. 3, provides that-

> "The Judge shall not instruct the jury on the need to scrutinise the evidence of young children generally with special care nor suggest to the jury that young children generally have tendencies to invention or distortion."

Sect. 23H(d) provides that the section should not "limit the discretion of the Judge to comment on ... specific matters raised in any evidence during the trial."

E. PROCEDURE IN MAGISTRATES' COURTS

5.30 For ease of exposition, our discussion has related to Crown Court procedure, where a formal instruction on evidence is given by the judge to the jury. However, it would seem desirable that any rules of evidence formulated for the protection of the accused should apply equally in magistrates' courts, as indeed do the present corroboration rules. We see no obvious reason why magistrates as a tribunal of fact should find it any harder to apply any of the rules suggested above than they do the present rules of evidence. However, we would particularly welcome comment on this point, and upon any of the matters raised earlier in the working paper, from those with experience of practice in magistrates' courts.

PART VI

SUMMARY OF PROVISIONAL PROPOSALS AND MATTERS ON WHICH COMMENT IS INVITED

6.1 We here summarise our provisional proposals and the specific matters on which we invite comments.

6.2 Our provisional proposals are as follows -

(1) The present common law rules, by which the judge is automatically obliged to warn the jury that it would be dangerous to convict the accused on the uncorroborated evidence of a prosecution witness who is (i) an accomplice of the accused or (ii) the complainant in a trial for a sexual offence, should be abolished.

(paragraph 4.42)

(2) The statutory requirement of corroboration relating to procuration offences under the Sexual Offences Act 1956 should be abolished.

(paragraph 4.42)

6.3 We invite comment on the proposals set out in the previous paragraph and, in particular, the identification of any reasons why the proposals should not be accepted. We should also particularly appreciate assistance concerning the practical effect and operation of the present rules.[1]

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1. Including comments on the extent to which the rules deter victims of sexual offences from pursuing complaints or co-operating with the police.

6.4 The proposals set out in paragraph 6.2 above further require us to consider how the law should develop if the present law on corroboration was abolished. There appear to us to be two broad possibilities: first, that the present rules should be abolished without replacement; second, that some other and different rules should be provided by legislation to deal with categories of doubtful evidence. We accordingly invite views on the following questions, and in particular on the likely practical operation and effect of any alternative system suggested below.

(1) Should the present corroboration rules be abolished without any replacement? What would be the practical effect of such a step?

(paragraphs 5.3-5.7)

(2) Alternatively, if the present rules are abolished, should the categories of evidence at present within the corroboration rules (namely, accomplice evidence given for the prosecution and that of complainants in sexual offences) be subject to some special legislative provision?

(paragraphs 5.18 and 5.23)

(3) Are there any other categories of evidence that should be subject to such special provision?

(paragraphs 5.18-5.23)

(4) Should such special provision require a mandatory warning and, if so, what should be the terms of such a warning?

(paragraphs 5.10-5.11)

(5) Alternatively, should there, in relation to any category of evidence, be a requirement broadly along the lines of the system proposed by the Australian Law Reform Commission?

(paragraphs 5.9-5.23)

If so, comment is invited on the possible following components of such a system -

(a) Should the judge should be under a duty to consider giving a warning whether or not a party requests him to do so? In either case, should he be required to hear submissions on the point?

(paragraph 5.12)

(b) Should the judge be obliged to give a warning unless there are good reasons not to do so?

(paragraph 5.10)

(c) If the judge decides against giving a warning, should he be required to give reasons (in the absence of the jury)?

(paragraph 5.13)

(e) If the judge gives a warning, should he be required to tell the jury <u>why</u> he is giving it?

(paragraph 5.14)

(d) If the judge decides that a warning is necessary: (i) should the terms of the warning be prescribed (see question 4 above), or (ii) should they be for the judge to determine?

(paragraph 5.15)

(6) Should any special provision apply to evidence <u>favourable</u> to the accused?

(paragraph 5.24)

(7) Are there any categories of evidence as to which judges should be forbidden by statute to give any warning, or where warnings in certain terms should be forbidden?

(paragraphs 5.25-5.29)

(8) Are there any reasons why a statutory scheme should not extend to trials in magistrates' courts?

(paragraph 5.30)

6.5 We shall also welcome comment on any aspect of the subject-matter of this working paper that is not expressly covered by the above questions.

APPENDIX A

THE ORIGINS OF THE COMMON LAW CORROBORATION RULES

Part 1
Accomplices

1. The roots of the law relating to the evidence of accomplices lie in the practice on the part of prosecuting authorities, both public and private, of seeking the co-operation of accomplices as the most likely means both of both apprehending and convicting offenders. To this end, the inducement of a pardon,[1] or of immunity from prosecution,[2] was offered.

2. The offer of a pardon or immunity from prosecution would largely depend on the accomplice's "performance" in court. In an era when the death penalty extended to

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1. By the late seventeenth century, the practice of granting pardons or promises of immunity, commonly accompanied by financial rewards, to accomplices for turning King's evidence was established. (Some sources date the practice from the reign of Edward IV.) There were statutory provisions for pardons where an accomplice's testimony would convict those charged with committing one of a specified number of offences; and pardons were given by royal proclamation after an accomplice had testified, or (with the Crown's permission) could be promised by a complainant in reward for evidence.

2. Some accomplices who gave evidence for the prosecution were granted only commuted sentences rather than freedom from prosecution. Promises of immunity were not always honoured. The promisee had to rely on the word of the magistrate, and had no legal right, but rather, in the words of Lord Mansfield CJ, "an equitable title to a pardon". Despite the uncertain nature of the reward for giving evidence "on approval", the practice became increasingly common throughout the eighteenth century.

relatively minor crimes, the incentive to commit perjury was very great. Thus, as the practice of granting "pleas of approvement" became more prevalent, judges became increasingly suspicious of the credibility of accomplice testimony.[3] However, although the evidence of accomplices was viewed with suspicion there was originally no formal requirement of corroboration, or even of a duty to give a corroboration warning: in 1680, Hale, while acknowledging the considerable dangers of relying on such testimony, considered that the credibility of the witness was best left to the jury.[4]

3. There is evidence of the existence in the 1750s of a "mandatory corroboration rule" applied by judges at the Old Bailey, who would direct the jury to acquit where there was no evidence to corroborate the testimony of an accomplice appearing for the prosecution.[5] Although it is doubtful whether this approach was universal at that time,[6]

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3. In Rudd (1775) 1 Cowp. Rep. 331, 336, 98 ER 1114, 1117, Lord Mansfield observed of accomplice witnesses that-

> "Though ... they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with a jury to convict the offenders; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself."

4. Pleas of the Crown, vol. I, p. 305.

5. Langbein, Shaping the Eighteenth Century Criminal Trial, pp.96-100.

6. However, Henry Fielding wrote, in general terms, in Increase of Robbers (1751), p.11, that -

> "Though the evidence of the accomplice be ever so positive and explicit, nay ever so connected and probable, still, unless it be corroborated by some other evidence, it is not sufficient."

courts became increasingly wary of accomplice testimony from the beginning of the eighteenth century.

4. Several cases between 1784 and 1788 laid the foundations for the common law corroboration rules in respect of accomplices. In Smith and Davis[7] although accepting that an accomplice was a competent witness, the court considered it too dangerous to permit a conviction based on the unsupported evidence of an accomplice. The subsequent case of Atwood and Robbins[8] clarified the position by dispelling any suggestion that the judge may withdraw the case from the jury in the absence of corroboration: rather, the judge must warn the jury of the danger of convicting upon the unsupported testimony of an accomplice.

5. Towards the end of the eighteenth century, there was an increase in the number of cases in which a person accused of a serious offence was represented by counsel. Greater jury attention was therefore directed to the weakness of uncorroborated accomplice testimony. This had a dual effect: it strengthened the effect of the corroboration rules in respect of accomplice testimony, but at the same time diminished the practice that had given birth to those rules of offering rewards or inducements to accomplices to testify, since their evidence without more was usually insufficient to secure a conviction.

6. Notwithstanding that the judge had to give a warning as to the dangers of relying on the uncorroborated testimony of an accomplice, the issue of whether or not the witness was to be believed remained a question for the jury.

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7. (1784) 1 Leach 479, n. (b), 168 ER 341.

8. (1788) 1 Leach 464, 168 ER 334.

The court could only determine, as a question of law, the competency of a witness to testify. Thus the accused could be convicted solely on the testimony of an accomplice.[9] In 1809 Lord Ellenborough CJ explained that -

> "No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only. Judges in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness."[10]

7. Until 1907, the warning given was "at most a salutary and usual practice, to be followed or not, at the judge's discretion".[11] It was not a prerequisite of a valid conviction.[12] With the establishment of the Court of Criminal Appeal, however, the need for a warning took on the force of a rule of law.[13] In 1954, in Davies,[14] the House of Lords affirmed that the rule, although one of practice, now has the force of a rule of law.

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9. Atwood and Robbins (1788) 1 Leach 464, 168 ER 334.

10. Jones 2 Campbell 131, 132-133, 170 ER 1105, 1106.

11. Per Lord Simonds LC in Davies [1954] AC 378, 396.

12. Although in 1837 Lord Abinger CB referred to the warning as "a practice which deserves all the reverence of law": Farler 8 Car & P 106, 107, 173 ER 418, 419.

13. For example, in Tate [1908] 2 KB 680, 682, the new court held that where the judge omitted to give a corroboration warning, and an accused was convicted solely on the testimony of an accomplice, the conviction must be quashed. The need for a corroboration warning was described in Baskerville [1916] 2 KB 658, 663, as "virtually equivalent to a rule of law".

14. [1954] AC 378, 399.

8. Originally, the term "accomplice" was limited to parties to the offence with which the accused was charged. Subsequently, it was extended to two other types of witness who, in a broad sense, might also be described as accomplices. First, a receiver of goods giving evidence at the trial of a person charged with stealing the goods was held to be an accomplice of the alleged thief;[15] secondly, in the exceptional cases where evidence of similar offences is admissible,[16] the warning was held to be required in respect of the testimony of parties to those offences.[17] In 1954 the House of Lords reviewed and confirmed these authorities.[18]

Part 2

Complainants in Sexual Offences

9. The rule requiring a corroboration warning to be given in respect of the testimony of victims of sexual offences apparently began to take its modern shape in the early years of the Court of Criminal Appeal.

10. The courts have long been cautious about relying on such testimony. A prosecutrix's evidence has traditionally been regarded as peculiarly susceptible to fantasy or fabrication, motivated by frustration, spite or remorse. An early presumption existed in medieval times against relying on the testimony of a woman bringing an appeal of rape. She had to prove that while the offence was recent she had raised the "hue and cry" in neighbouring towns, and shown

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15. Jennings (1912) 7 Cr App R 242; Dixon (1925) 19 Cr App R 36.

16. Under the "similar fact" principle; see paras. 2.25-2.26 above.

17. Farid (1945) 30 Cr App R 168.

18. Davies [1954] AC 378, 400-401; see para. 2.12 above.

her injuries and clothing to men. An alleged failure to do so could be raised as a defence by the appellee. Reference to this requirement is made as long ago as Bracton's De Corona (c. 1267). In 1905 the Court for Crown Cases Reserved observed that this rule was exceptional, because it was only in rape cases that the prosecution had to prove that the complainant had raised the hue and cry, and it was a defence that she had not.[19] The requirement has long since fallen into disuse; but it is unclear whether it fell completely out of use or was replaced by some other form of corroboration rule, however amorphous.

11. Certainly, a complainant's testimony continued to be treated with distrust and caution. As early as 1680 Hale recognised that rape presented peculiar risks of concoction -

> "...it must be remembered that it [the allegation of the rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[20]

However, it is significant that in the paragraph preceding this passage he considered how the common law should deal with the problem of witness mendacity in these situations -

> "the credibility of the [complainant's] testimony and how far forth she is to be believed, must be left to the jury and is more or less credible according to the circumstances of the fact that concur in the testimony."

It is paradoxical that Hale's comment has been used to justify the present corroboration requirement in trials for sexual offences, since it is doubtful whether he envisaged formal rules of the type now generated by that requirement

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19. Osborne [1905] 1 KB 551, 559.

20. Pleas of the Crown, Vol.1, c.58, p. 635.

to deal with the problem of witness reliability. Hale's view appears to have been that if support was required for particular testimony then "circumstances that concur in the testimony" should suffice.

12. Hale's view was substantially reiterated by Blackstone, who stated of an adult rape victim -

> "... [she] is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony."[21]

However, he went on to refer specifically to the case where the rape victim was under twelve years of age. In such cases a conviction should not be supported unless there was confirmation of the complainant's testimony -

> "... it is much to be wished, in order to render [children's] evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion."

13. The introduction in the nineteenth century of several statutes that, exceptionally, required corroboration of testimony was crucial in the development of the common law corroboration warning in trials for sexual offences. The Criminal Law (Amendment) Act 1885 extended the ambit of the criminal law in the field of sexual offences, and a number of the new offences contained provisions that precluded conviction on the uncorroborated testimony of the complainant. The Act required the witness to be "corroborated in some material particular by evidence

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21. Commentaries on the Laws of England (1811), Book IV, p. 213.

implicating the accused".[22] It was the operation of these provisions, crystallised by the creation of the Court of Criminal Appeal, that induced judges to introduce a general requirement that a warning should be given.

14. The first edition of Halsbury's Laws (1910) makes no mention of any rule of law or practice requiring a corroboration warning to be given for sexual offences. By contrast, the second edition (1934) refers to the mandatory warning as a firmly established rule of practice.[23]

15. The Court of Criminal Appeal appears to have first considered the need for a warning in 1910. In Graham,[24] the Court approved the direction given by the trial judge in which he had -

> "pointed out the risk of acting on the evidence of the girl, unless corroborated; and at the same time ... explained that strictly speaking the law did not require that her evidence should be corroborated, and that if they believed the girl's evidence they could act upon it."[25]

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22. It is believed that this definition was derived from the Poor Law Amendment Act 1834, s. 72, which required corroboration in affiliation cases. At that period there was a ban on witnesses who had a proprietary or pecuniary interest in the outcome of the case. Although women who were called to testify as to paternity strictly had no interest in the case between the parish seeking maintenance and the putative father, their evidence was required to be "corroborated in the material particular by other testimony".

23. vol. 13, para. 841, citing, among other authorities, Lovell (1923) 129 LT 638; Ross (1924) 18 Cr App R 141; Jones (1925) 19 Cr App R 39.

24. (1910) 4 Cr App R 218.

25. ibid., 220.

The fact that this warning was given at the trial may indicate that the corroboration warning already had a foundation in practice.

16. In Brown,[26] the conviction of the accused on a charge of incest was overturned because the jury had not been warned of the danger of convicting on the uncorroborated evidence of the victim. Delivering the judgment of the Court of Criminal Appeal, Lord Alverstone CJ stated -

> "In our view the girl was an accomplice, but even if she were not, she was a witness who on her own story had been letting her father have connection with her, and was certainly an abandoned girl."[27]

Lord Alverstone observed that there had been an invariable practice for years of cautioning juries about accepting the evidence of "such a witness" against the testimony of an accused. It is unclear, however, whether he was referring to the ground of the complicity of the witness, or to the fact that she was a complainant in respect of a sexual offence.

17. The reason for the warning requirement was not clarified by the court's decisions in Pitts[28] and Cratchley,[29] where the court held that a warning should be given, but seemed to do so on the basis of the tender years of the complainant. However, in 1918, in Dossi,[30] Atkin J in the Court of Criminal Appeal explained that the mandatory

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26. (1910) 6 Cr App R 24.

27. (1910) 6 Cr App R 24, 26.

28. (1912) 8 Cr App R 126.

29. (1913) 9 Cr App R 232.

30. (1918) 87 LJKB 1024, 1026.

warning was appropriate equally to the testimony of child and of adult complainants. In 1924, in Ross,[31] Lord Hewart CJ formulated the rule in its present form - namely, as requiring the judge to warn the jury that it is not safe to convict on a charge of a sexual nature on the uncorroborated testimony of the complainant.

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31. (1924) 18 Cr App R 141, 142.

APPENDIX B

CORROBORATION IN CRIMINAL TRIALS: A COMPARATIVE LAW STUDY

INTRODUCTION

1.1 This Appendix sets out the rules governing corroboration, and, where applicable, a summary of proposals for reform made by law reform bodies in other jurisdictions. This study covers the law in Canada, Australia, New Zealand, the United States and Scotland.

1.2 With the exception of Scotland, the laws in these jurisdictions share a common or closely related ancestry, which is the same as that of the English law. To avoid unnecessary repetition, therefore, we concentrate on differences between the law of the jurisdiction under review and English law. In the case of Canada and Australia, emphasis is placed on proposals for the reform of existing rules that are very similar to the present English rules. As regards New Zealand, we examine the radical reforms effected by legislation in recent years. In the United States the law has developed somewhat differently because of the limits placed there on the power of the judge to direct the jury as to fact.

CANADA

2.1 In Canada, there have been two major recent surveys of the law of evidence by reform bodies, the Law Reform

Commission in 1975, and the Federal/Provincial Task Force on the Uniform Laws of Evidence in 1982. Both bodies made recommendations for reform of the law of corroboration, neither of which have been implemented, but the law has undergone substantial reform by the courts and the legislature in recent years.

The Canadian Law Reform Commission recommendations in 1975

2.2 In 1975, the Canadian Law Reform Commission produced a report on Evidence. They recommended that every rule of law requiring corroboration as the basis of a conviction, or requiring the judge to warn the jury of the dangers of convicting on uncorroborated evidence, be abrogated.

2.3 The Commission's conclusion was that there was no evidence to suggest that juries are more likely to be misled by the evidence of accomplices, victims of sexual offences or young children than by any other witness. In their view, juries are able to evaluate the testimony before them, taking into account such factors as its source and the fact that it is unsupported. They saw no reason why the frailties of the evidence of these types of witness should not be equally open to exposure by cross-examination and the arguments of counsel as that of any other witness. They regarded the statutory requirements of corroboration with regard to the offences of perjury, treason and forgery as historical anomalies, and saw no reason for those offences to be treated any differently from any other offence.

The Task Force recommendations in 1982

2.4 In 1982, the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence was published, containing

a draft Uniform Evidence Act for Canada. The corroboration proposals were contained in clause 125, which provides -

> "(1) Subject to subsection (2), no corroboration is required and no warning concerning the danger of acting on uncorroborated evidence shall be given in any proceeding.
>
> "(2) The court shall instruct the trier of fact on the special need for caution in any case in which it considers that an instruction is necessary, and shall in every case give the instruction with respect to
>
> (a) the evidence of a witness who has testified without taking an oath or making a solemn affirmation;
>
> (b) the evidence of a witness who, in the opinion of the court, would be an accomplice of the accused if the accused were guilty of the offence charged;
>
> (c) the evidence of a witness who is proved to have been convicted of perjury; or
>
> (d) on a charge of a treason, high treason or perjury where the incriminating evidence is that of only one witness."

2.5 If implemented, these proposals would have abolished every absolute corroboration requirement. However, while the provision abrogated the current common law warning, a mandatory warning of the special need for caution was retained for various categories of evidence. The categorisation of evidence to which the warning was to attach was a novel departure, comprising categories of evidence some of which were the subject of an absolute requirement of corroboration; some which previously attracted the existing mandatory warning; and some to which no rules of corroboration had previously attached. Notably absent from this classification of suspect evidence was the evidence of complainants in sexual offences and the sworn evidence of children. Where the warning was required, it was simply to be of the special need for caution and did not require the formalities of the corroboration warning. It is

noteworthy also that the question whether a witness was an accomplice was to be determined by the judge alone.

The current Canadian law

(a) Statutory requirements of corroboration

2.6 In Canadian law, corroboration is a statutory requirement in respect of the offences of treason and high treason;[1] sexual offences of procuring; procuring a feigned marriage;[2] and forgery.[3]

2.7 Recent reforms have removed the corroboration requirement from the offence of perjury[4] and from the unsworn testimony of children.[5]

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1. By s.47(3) of the Criminal Code, which provides that no person shall be convicted of treason or high treason upon the evidence of only one witness unless that testimony is corroborated in some material particular by other evidence that implicates the accused.

2. Ibid., s.256(2). The offence is defined by s.256(1) as procuring, or knowingly aiding in procuring, a feigned marriage with the accused.

3. Ibid., s.325(2).

4. The requirement was contained in s. 123 of the Criminal Code; the section was repealed in 1985.

5. By the 1987 Canada Evidence Act. Sect. 15 of that Act repealed s. 586 of the Code, which laid down this requirement; and s. 16 of the Canada Evidence Act was repealed and replaced by s. 18 of the 1987 Act. The old s. 16 contained the rules for admissibility of the unsworn evidence of children with a proviso that the court should not decide any case against an accused solely on uncorroborated evidence admitted by virtue of that section. The corroboration requirement is not restated in the new s. 16.

(b) The common law mandatory warning

(i) The evidence of complainants in sexual offences

2.8 The original common law rule requiring the judge to warn the jury of the danger of convicting on the uncorroborated evidence of the victim of an alleged sexual offence was embodied in section 142 of the Criminal Code. This section of the Code was repealed in 1976. Although the repeal of this section did not revive the old common law rule, it did not affect the judge's discretionary power to give a warning, in any type of case, in relation to a particular witness.[6] In 1987 a new section[7] was added to the Code which provided, in relation to certain sexual offences, that no corroboration was required for a conviction and, further, that the judge should not instruct the jury that it was unsafe to convict in the absence of corroboration. The offences are: incest; gross indecency; sexual assault; sexual assault with a weapon, threats to a third party or causing bodily harm; and aggravated sexual assault.

(ii) Accomplice testimony

2.9 The requirement of a corroboration warning with respect to the evidence of accomplices was the subject of review and reform in the Canadian Supreme Court in Vetrovec.[8] Dickson J identified four factors underlying the rationale of the rule. These were the fear that an accomplice might testify in an attempt to attract leniency, or in return for a promise of favourable treatment by the prosecutorial bodies; the temptation acting on an accomplice to seek to minimise his role in an offence by shifting the

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6. Camp (1977) 36 C.C.C. (2d) 511.

7. Criminal Code, s. 246.4.

8. (1982) 136 DLR (3d) 89.

blame on to the accused; the danger that an accomplice may be attempting to implicate an innocent accused in order to protect his criminal associates; and the conviction that the moral guilt of an accomplice should preclude his testimony from being accepted without any other evidence in support. Having identified these factors, he concluded -

> "None of these arguments can justify a fixed and invariable rule regarding all accomplices. All that can be established is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witness. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices, then, is to fasten upon this branch of the law of evidence a blind and empty formalism."[9]

2.10 Dickson J further argued that the old law provided no real safeguard against false convictions. Any benefit to the defendant which it provided in theory was lost by a "welter of legal niceties which either goes over the jury's head and leaves them confused, or else is understood and then ignored as contrary to common sense." Indeed, the Supreme Court considered that a corroboration warning may be prejudicial to the accused, since, in directing the jury on corroboration, the judge must repeat and highlight any evidence which corroborates the evidence of the accomplice against the accused.[10]

2.11 The court held that the testimony of accomplices should be treated in the same way as that of all other witnesses. That is, it should be for the trial judge to assess the credit due to the testimony of all witnesses, and not just of accomplices. Where he feels that the jury

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9. Ibid. at p.11.

10. (1982) 136 DLR (3d) 89, 95.

should be warned to treat a certain testimony with caution, he may instruct them accordingly. No fixed form of warning was necessary; it was for the judge to direct the jury as he saw fit. To this end it may be appropriate, in some circumstances, for the judge to give a "clear and sharp warning" to attract the jury's attention to the risks of accepting without more the evidence of a witness. If, on the other hand, he considers that a witness is trustworthy, then regardless of whether that witness is technically an accomplice, no such instruction is necessary. Since this decision, the Canadian trial judge need only ensure that his summing-up is sufficient to draw attention to any weaknesses in the prosecution's witnesses. Where an appellate court has any doubt as to the adequacy of the direction, any conviction should be quashed.

(iii) The sworn evidence of children

2.12 Although the former statutory rule requiring corroboration of the unsworn evidence of children was repealed in 1987, the common law requirement of a warning of the dangers of convicting on the uncorroborated sworn evidence of children[11] was not affected.

The nature of corroborative evidence

2.13 At the same time as there has been a reduction in the number of cases in which there is a need to look for corroborative evidence, the courts have expanded the concept of what may amount to corroborative evidence.[12] Even before Vetrovec, two decisions of the Canadian courts in

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11. Kendall (1962) 132 C.C.C. 216.

12. This does not apply to those cases in which corroboration is still required by statute: e.g., Jackson [1988] C.C.L. 5743.

rape cases[13] had cast doubt on the traditional formal requirements. These cases led one commentator to assert, before Vetrovec, that corroboration in sexual cases could be provided by any evidence which enabled the jury to feel sure enough to convict.[14]

2.14 Dickson J in Vetrovec[15] disapproved the Baskerville definition of corroboration on three grounds. First, he thought it obscured the reason for the warning requirement, which was the need to bolster the credibility of accomplice testimony. The technical nature of the definition was such that not all evidence which had this effect was capable of providing corroboration. Moreover, whether evidence is capable of being corroborative had become a question of law, rather than simply a question of whether it lends credence to the suspect evidence. Furthermore, he considered the definition to be flawed in principle for it insists that corroborative evidence be evidence implicating the accused in the offence. In the view of the Supreme Court, this is not the only kind of evidence which may make the accomplice's evidence more credible.

2.15 In Vetrovec, the appellant contested his conviction on a charge of conspiracy to traffic in heroin on the ground that the trial judge had erred in his direction as to what evidence was capable of providing corroboration of the testimony of an accomplice. The accomplice had given evidence of a specific smuggling trip; the judge had directed that items of evidence which tended to connect the accused with drug-trafficking activities in general were

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13. Warkentin (1976) 30 C.C.C. (2d) 1; Murphy and Butt (1976) 29 C.C.C. (2d) 417.

14. Clarke, [1980] Crim LR 362.

15. (1982) 136 DLR (3d) 89, 100-102.

capable of corroborating this testimony (these were evidence of other trips made by the defendant, and of quantities of U.S. currency in his possession); the accused claimed that this evidence was too remote to be corroborative because it did not relate to the overt act testified to by the accused. The court held that the judge's direction had done no harm to the accused and dismissed the appeal.

2.16 The court held that corroboration should not be treated as a legal term of art, and that any evidence tending to show that the witness is telling the truth should, in principle, be capable of providing corroboration. Dickson J drew support for this decision from the earlier decisions in Warkentin and Murphy.[16] He considered this simplification to the law of corroboration to be a return to the old common sense approach adopted in early English cases.[17]

AUSTRALIA

Introduction

3.1 The corroboration rules, and their sphere of operation, are, with exceptions, broadly similar in England and Australia. However, the Australian Law Reform Commission (the "ALRC") has published two reports on the law of evidence[18] which include a review of, and reform proposals for, the corroboration rules. The existing law is

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16. (1976) 30 C.C.C.(2d) 1; (1976) 29 C.C.C.(2d) 417, respectively: see above, para. 2.13 to this Appendix.

17. e.g., Davidson and Tidd (1820) 33 State Tr. 1338.

18. ALRC, Evidence, Report No.26 (Interim)(1985); ALRC, Evidence, Report No.38 (1987). For convenience, we refer to them as "ALRC 26" and "ALRC 38".

reviewed in the earlier of these, an interim report published in 1985.[19]

Corroboration as a statutory requirement

(a) Treason and sedition

3.2 The ALRC identified a number of crimes to which a statutory requirement of corroboration attaches. Under state legislation, modelled on earlier imperial statutes, two testimonies are required before there can be a conviction of treason. There is also a separate statutory offence of treason under section 24 of the Crimes Act 1914 (Commonwealth). No mention is made in the Act of a need for corroboration or a second testimony with respect to this offence, and the ALRC's Report concluded that it was doubtful whether such a requirement exists.[20] Evidence in favour of this view is provided by section 24D(2) of the same Act, which specifically provides that no person may be convicted of sedition upon "the uncorroborated evidence of one witness". There are similar provisions in the criminal codes of Queensland, Tasmania and Western Australia.

3.3 The ALRC made no recommendation to alter the corroboration requirements affecting treason and sedition. In their view, the requirements were part of the substantive law governing the offences themselves, based on the need to ensure that the individual is fully protected from oppressive conduct by the state, and not suitable for treatment in a reform exercise dealing with evidence law.[21]

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19. ALRC 26 (Interim), Evidence.

20. ALRC 26, Vol.2, para. 306.

21. ALRC 26, Vol.1, para. 1022.

(b) Perjury

3.4 At common law, there can be no conviction of perjury on the uncorroborated testimony of one witness as to the falsity of the accused's statement.[22] This rule has been enacted in the Criminal Codes of Queensland, Tasmania and Western Australia. The ALRC proposed retention of this requirement. They saw force in the view that there was a need to protect witnesses from false charges of perjury, which, if they were common, would discourage people from giving evidence. Any alteration to the rule should be approached in a review of the substantive law of perjury.[23]

(c) Bigamy

3.5 By section 94(7) of the Marriage Act 1961 (Commonwealth), where an accused is prosecuted for bigamy, the fact that he was married at the time of the alleged offence can not be proved by the evidence of the other party to the alleged marriage alone. Once again, the ALRC declined to propose any reform of this requirement, considering it was not a suitable subject for the attention of a law reform project on evidence.[24]

(d) The unsworn evidence of children

3.6 Except in Queensland, where there is a warning requirement which operates only when there is no corroborating evidence, there is legislation in all the states requiring corroboration of the unsworn evidence of a child before an accused may be convicted on it. In New

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22. See Linehan [1921] VLR 582.

23. ALRC 26, Vol.1, para. 1021.

24. ALRC 26, Vol. 1, para. 1022.

South Wales, corroboration is only required to prove certain specified offences. The ALRC considered that there was no clear evidence refuting the "experience of many years" that the testimony of children (and of accomplices and sexual complainants) was more unreliable than that of witnesses generally. For this reason, as discussed below,[25] they considered that their categorisation as suspect witnesses should continue to play a part in their proposed reform of the corroboration warning.[26]

3.7 These remarks are addressed to the issue of the rule requiring a warning in respect of the sworn testimony of a child. The ALRC made no specific comment on the corroboration requirement affecting the unsworn evidence of children. In general they stated that corroboration requirements specifically imposed by statute should not be abolished.[27] However, clause 139 of their draft Evidence Bill states that evidence on which a party relies need not be corroborated. To this general rule, the only exception provided is that the clause shall not affect any requirement relating to "perjury or a like or related offence". It is difficult to reconcile this drafting with the Commission's declared intention not to interfere with the statutory corroboration rules.

The mandatory corroboration warning

(a) Accomplices

3.8 In Queensland, there is a statutory requirement of corroboration before an accused may be convicted on the

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25. At para. 3.12.

26. ALRC 26, Vol. 1, para. 1010.

27. ALRC 38, para. 238.

evidence of an accomplice.[28] In the other jurisdictions, the common law requires a warning to be given to the jury of the dangers of convicting on the uncorroborated testimony of an accomplice. The definition of an accomplice for this purpose follows the House of Lords decision in Davies,[29] although some Australian courts have extended the ambit of the rule to the testimony of a co-defendant given on his own behalf, which does not attract the operation of the rule in England and Wales.[30]

(b) Complainants in sexual cases

3.9 The corroboration rules affecting the testimony of sexual complainants vary from state to state in Australia. In all jurisdictions, corroboration is required by statute in respect of certain sexual offences. Where the statutory requirement does not apply, a common law rule of practice requires a warning to be given to the jury of the dangers of convicting on uncorroborated testimony from such a source. It is doubtful whether Australian courts insist on the warning with such rigour as in England and Wales. It appears that the courts will overturn a conviction where no warning is given only if there is no evidence capable of providing corroboration of the complainant's testimony.[31] In Victoria, section 62(3) of the Crimes Act (Sexual Offences) 1980 abolished the mandatory warning in sexual cases. A more limited abolition of the rule was effected in New South Wales by the Crimes (Sexual Assaults) Amendment

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28. Sect. 632, Criminal Code 1899 (Queensland).

29. [1954] AC 378.

30. See para. 2.14, Part II of the body of this working paper, above.

31. See Kelleher (1974) 131 CLR 534; Byczko (No.1) (1977) 16 SASR 506.

Act 1981,[32] which provides that, in relation to the four most serious cases of sexual assault, the judge is "not required by any rule of law or practice" to give a corroboration warning. As a matter of discretion, however, the judge may give such a warning when it is sought by counsel and when the judge considers it "appropriate" to give one.[33]

(c) The sworn evidence of children

3.10 On a review of the authorities, the ALRC concluded that the warning requirement in respect of the sworn evidence of children is a matter of practice.[34] The courts will only overturn a conviction for want of a warning where there is no evidence capable of providing corroboration.

The Australian Law Reform Commission proposals

3.11 The ALRC were impressed by the argument that a complete abolition of the corroboration warning requirement without replacement might cause the courts either to return to a prosecution-minded bias, or to restart the process by which the existing law has developed.[35] They considered it necessary to maintain some sort of control. However, they considered that the present law, in its complexity, creates problems that can exceed the help that it may give. In their view, a simpler and more flexible regime was required.[36]

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32. Inserting a new s. 405C into the Crimes Act 1900.

33. Preval [1984] 3 NSWLR 647 (Criminal Court of Appeal).

34. ALRC 26, Vol. 2, para. 305.

35. ALRC 26, Vol.1, para. 1009.

36. Ibid., para. 1015.

3.12 Their proposal was that the existing requirements, and the complex technicalities surrounding those rules, should be abolished. However, as noted above,[37] they felt that the experience which had led the courts to require a warning in respect of certain categories of testimony should not be ignored.

> "Rules should be adopted which take account of the existing categories. This should be done, however, in a way which avoids the barren and anomalous technicalities and suggested discrimination of the existing law and encourages the giving of appropriate directions in respect of all witnesses. It is proposed that there be an obligation to give a warning, unless there is good reason not to, where it appears to the judge that evidence coming within one of several broadly described categories may be unreliable, or its probative value may be over-estimated."[38]

The categories of suspect evidence are listed in the following paragraph. The judge's power to direct the jury about evidence falling outside those categories was to be unaffected, and the nature and strength of the warning given would vary with the circumstances and other evidence of the case.

3.13 The final report of the ALRC[39] contained a draft Evidence Bill. Their recommendations on corroboration were embodied in clauses 139 and 140, which are as follows -

> "139.-(1) It is not necessary that evidence on which a party relies be corroborated.
>
> (2) Subsection (1) does not affect the operation of any rule of law that requires corroboration with respect to the offence of perjury or a like or related offence.

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37. At para 3.6.

38. ALRC 26, Vol. 1, para. 1017.

39. ALRC 38.

(3) Notwithstanding any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, where there is a jury, it is not necessary that the Judge -

(a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or like effect; or

(b) give a direction relating to the absence of corroboration.

"140.-(1) This section applies in relation to the following kinds of evidence:

(a) evidence in relation to [hearsay and admissions];

(b) identification evidence;

(c) evidence the reliability of which may be affected by age, ill-health (whether physical or mental), injury or the like;

(d) in a criminal proceeding -

(i) evidence given by a witness called by the prosecutor, being a person who might reasonably be supposed to have been concerned in the events giving rise to the proceeding; or

(ii) oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant;

(e) in the case of a prosecution for an offence of a sexual nature - evidence given by a victim of the alleged offence;

(f) ...

(2) Where there is a jury and a party so requests, the Judge shall, unless there are good reasons for not doing so -

(a) warn the jury that the evidence may be unreliable;

(b) inform the jury of the matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) It is not necessary that a particular form of words be used in giving the warning or information.

(4) This section does not affect any other power of the Judge to give a warning to, or to inform, the jury."

NEW ZEALAND

Introduction

4.1 Formerly, the corroboration rules of the New Zealand law of criminal evidence were very similar to those of English law. In recent years, however, the law has been transformed by legislation which, as to some matters, implements the recommendations made by the Evidence Law Reform Committee (the "ELRC") in its 1984 Report on Corroboration.

Sexual offences

4.2. The Evidence Amendment Act (No. 2) 1985[40] provides that -

"(1) Where any person is tried for an offence ... against the person of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the Judge shall not be required to give any warning to

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40. Sect. 3, inserting a new s. 23AB in the Evidence Act 1908.

the jury relating to the absence of corroboration.[41]

"(2) If, in any such case, the Judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words shall be required."[42]

4.3 By contrast with the Canadian legislation referred to at paragraph 2.8 above, the New Zealand legislation does not prohibit the judge from giving the jury a corroboration warning in relation to the complainant's evidence in sexual cases. The ELRC considered but rejected what it called the "inflexible" Canadian approach to this matter, which, the ELRC feared, could in some cases lead to wrongful conviction. In the ELRC's view, there were circumstances in which comment on aspects of the complainant's evidence might be appropriate, just as there might be in relation to any other evidence.[43]

Accomplices

4.4 Under the Evidence Amendment Act (No. 2) 1986[44] -

"No corroboration of the evidence given by an accomplice of the accused shall be required for the

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41. This provision accords with the views of the ELRC, which considered that this category of evidence should be treated in the same way as any other evidence: Report on Corroboration (1984), paras. 139-143.

42. This subsection reflects the views of the ELRC that the Baskerville definition of corroboration (see above, paras. 2.20-2.21 of the body of the paper) as independent evidence which implicates the accused in a material particular was unduly restrictive: Report on Corroboration (1984), para. 20.

43. Report on Corroboration (1984), para. 140.

44. Sect. 2, inserting a new. s. 12B in the Evidence Act 1908. Exceptionally, the provision does not apply to treason or perjury: ibid.

accused to be convicted, and it shall not be necessary for the Judge to give any warning to the jury relating to the absence of corroboration."[45]

Witnesses with a purpose of their own to serve

4.5 The 1986 Act provides, further, that -

> "Where in any criminal proceedings it appears to the Judge that a witness may appear to have some purpose of his or her own to serve in giving evidence and that for that reason there is a risk that the witness may give false evidence that is prejudicial to the accused, the Judge shall consider whether or not it would be appropriate to instruct the jury on the need for special caution in considering the evidence given by the witness."[46]

Children's evidence

4.6 Formerly, a warning was almost invariably given that the testimony of young children should be scrutinised with special care and that they were prone to invention or

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45. By contrast with the provision set out in para. 4.2 above (relating to complainants' evidence in sexual cases), this change in the law runs contrary to the ELRC's views: in relation to accomplices, the ELRC recommended a mandatory legislative requirement of a warning as to the special need for caution (Report on Corroboration (1984), para. 117).

46. Sect. 2, inserting in the Evidence Act 1908 a new s. 12C. The provision gives effect to a recommendation of the ELRC: Report on Corroboration (1984), para. 118. In exercising this discretion the judge should be assisted, the ELRC proposed, by a concurrent Practice Note directing judges to consult counsel in the absence of the jury on the question whether an instruction on the need for caution should be given. The ELRC envisaged that in every case the judge would make a written note of his decision and his reasons, which would form part of the record of the case and be available to an appellate court (para. 119).

distortion,[47] although there was no rule requiring such warning to be given. Recently, however, the Evidence Amendment Act 1989, section 3, inserted in the Evidence Act 1908 a new section 23H, the material part of which provides that -

> "(c) The Judge shall not instruct the jury on the need to scrutinise the evidence of young children generally with special care nor suggest to the jury that young children generally have tendencies to invention or distortion.
>
> "(d) Nothing in ... paragraph (c) of this section shall limit the discretion of the Judge to comment on ... specific matters raised in any evidence during the trial ... ."

Statutory corroboration requirements in trials for treason or perjury

4.7 Corroboration is required by statute for a conviction of perjury or of treason.[48] In the case of both offences, the requirement is simply that no person may be convicted on the evidence of a single witness without corroboration. The requirement of corroboration applies to all offences of treason against the state of New Zealand.[49] What is required is corroboration of a single witness's evidence and not a second testimony. In the case of perjury, while English law requires only that the evidence of one witness as to the falsity of the accused's statement

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47. Parker [1968] NZLR 325. The practice did not, however, call for a full corroboration warning.

48. By, respectively, ss. 112 and 75 of the Crimes Act 1961.

49. But not to treason under s.73(a) of the Crimes Act 1961, which is committed by any person who "kills or wounds or does grievous bodily harm to Her Majesty the Queen, or imprisons or restrains her": s.75(2).

be corroborated,[50] New Zealand law provides that there can be no conviction of perjury on the uncorroborated evidence of one witness alone. Each of these requirements was reshaped in 1961 from old provisions modelled on the English statutes. By section 3 of the Oaths and Declarations Act 1957, the unsworn evidence of a child has the same force and effect as sworn testimony, and requires no corroboration.

UNITED STATES OF AMERICA

Introduction

5.1 The corroboration rules in the United States vary a great deal between different jurisdictions. General patterns can be best identified by reference to the different classes of evidence to which corroboration rules apply.

Corroboration rules applying to categories of witness

(a) Accomplices

5.2 While at common law a defendant may be convicted on the uncorroborated testimony of an accomplice, the judge traditionally gives a warning to the jury that the evidence of an accomplice is of weak character and that they ought not to convict on such testimony unless there is independent evidence corroborating it. It is generally considered that the issue of such a warning is solely a matter for the discretion of the judge and that the omission of the caution from the judge's summing-up is not, per se, a ground for overturning a conviction or for ordering a new trial.

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50. See above, paras. 3.8-3.9 of the body of the paper.

5.3 In about half the jurisdictions in the United States this customary practice has been converted into a rule of law by statutory provisions requiring corroboration of the testimony of an accomplice before an accused can be convicted.[51] In some of these jurisdictions the statutory rule is limited in application to the testimony of accomplices in trials for certain specific types of offence.[52]

(b) Complainants in sexual offences

5.4 At common law in the United States there is no requirement of corroboration of the testimony of a complainant in a sexual case, nor of a caution to the jury of the dangers of acting on such testimony when it is uncorroborated. Some states have statutory or judicial rules requiring corroboration of such testimony. This requirement has never operated uniformly across the United States.

5.5 In 1973, the Yale Law Journal identified seven states where corroboration was required of the testimony of a complainant in rape cases, and a further eight where there was a more limited form of the requirement, applying, in Massachusetts for example, only to rapes not reported within three months. Thirty-five states had no corroboration requirement in rape cases at that time.[53] Since that date, the trend has been for jurisdictions to abandon the

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51. see e.g. Alabama Code tit. 15, para. 307; Californian Penal Code, art. 1111; New York Criminal Procedure Law article 60.22.

52. e.g. felonies in Alabama and Georgia, bribery in Oklahoma.

53. "The Rape Corroboration Requirement: Repeal not Reform", (1973) 81 Yale L.J. 1365.

corroboration rules for rape. In Georgia, for instance, the corroboration requirement with respect to rape complainants was abolished in 1978, although corroboration is still required of the testimony of victims of statutory rape (unlawful sexual intercourse with a girl under 14 years of age). After this repeal in Georgia, only the Virgin Islands of all the United States jurisdictions retained a statutory requirement of corroboration in rape cases.[54]

5.6 The District of Columbia provides a useful illustration of the development of, or the retreat from, the corroboration doctrine in sexual offence cases. There was no requirement at common law, but a doctrine requiring corroboration grew up from judicial interpretation of two cases involving adult female complainants in rape cases.[55] This corroboration requirement grew to extend to lesser sexual offences[56] and to child victims.[57] At first, this requirement was strictly applied so that corroboration had to be found both of the corpus delicti of the offence and of the identity of the offender. Two 1973 decisions relaxed the requirement so that evidence is corroborative where it permits the jury to conclude beyond reasonable doubt that the victim's account of the crime is not a fabrication. In Arnold v. U.S.,[58] the requirement was abolished with respect to the evidence of mature female complainants. It was later held that this decision did not affect the requirement as it applied to the testimony of child victims of sexual

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54. Pratt, "The Demise of the Corroboration Requirement: Its History in Georgia Rape Law", (1977) 26 Emory L.J. 805.

55. Lyles v. U.S. (1902) 20 App. D.C. 559; Kidwell v. U.S. (1912) 38 App D.C. 566.

56. Kelly v. U.S. (1952) 194 F.2d 150.

57. Wilson v. U.S. (1959) 271 F.2d 492.

58. (1976) 358 A.2d 335.

offences.[59] This decision was justified on the basis that the testimony of children was less trustworthy than that of adults. It was subsequently overruled first in the courts[60] and then by the coming into force of the Child Abuse Reform Act 1984. Since then there has been no corroboration requirement in sexual cases in the District of Columbia.

5.7 In other states where there is no absolute requirement of corroboration, a direction to the jury of the need for caution in dealing with a sexual complainant's testimony has either been mandatory or left to the discretion of the trial judge. Use of this cautionary instruction has also declined in recent years. For instance, a 1982 amendment to s.3106 of the Pennsylvania Crimes Code abolished the old requirement of a caution in rape cases, by a provision that the credibility of the victim in a rape case was to be determined by the same standard as in other crimes. In California, until 1975 a warning was required of the need to examine with caution the testimony of a complainant in a rape case. In that year, in the case of People v. Rincon-Pineda,[61] Judge Armand Arabian refused to give such a warning, saying:

> "I find that the giving of such an instruction in this case is unwarranted either by law or reason, that it arbitrarily discriminates against women, denies them equal protection of the law, and assists in the brutalization of rape victims by providing an unequal balance between their rights and the rights of the accused in court."[62]

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59. Fitzgerald v. U.S. (1982) 443 A.2d 1295.

60. Gary v. U.S. 499 A.2d 815 (D.C. 1985).

61. 14 Cal.3d 864 (1975).

62. cf. the argument of the Model Penal Code's commentators (below at para. 5.18) justifying the retention of corroboration rules in relation to the testimony of complainants.

When the case reached the California Supreme Court, they unanimously agreed to strike out the cautionary instruction in all sexual cases. The cautionary instruction has also been prohibited in sex cases by statute or judicial decision in a number of other U.S. jurisdictions.[63]

5.8 The first state to prohibit the warning was Virginia in 1895.[64] The court upheld the refusal of the trial court to give the direction, and held that the cautionary instruction should not be the subject of a judicial direction. A later court considered that the giving of such a direction by the judge invaded the province of the jury.[65] More recently, in Washington state, the court held that a cautionary instruction on the testimony of a sexual complainant constitutes the expression of a personal opinion by the judge, is a prejudicial comment on the evidence by him, and "is pregnant with constitutional error".[66] This view of such a judicial direction may be explained by the rule operating since the mid 19th century prohibiting the judge from helping the jury by expressing his opinion on the weight of the evidence in a case. The existence of such a rule may also explain why many states have statutory corroboration requirements rather than mandatory warning rules in respect of the testimony of suspect witnesses.

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63. e.g. Virginia, Ohio, Missouri, North Dakota: see Arabian, "The Cautionary Instruction in Sex Cases: A Lingering Insult," (1978) 10 Southwestern U.L.R. 585.

64. Crump v. Commonwealth 23 SE 760 (1895).

65. Gottlieb v. Commonwealth 101 S.E. 872 (1920).

66. State v. Mellins 470 P.2d 558, 560 (1970).

(c) Children

5.9 In a few states, notably New York,[67] the uncorroborated unsworn testimony of a child is insufficient to found a conviction.

Corroboration rules applying to categories of evidence

(a) Confession by the defendant

5.10 In all but a few United States jurisdictions, an extrajudicial confession by the defendant without corroboration is not considered sufficient to sustain a conviction.[68]

(b) Eye witness identification evidence

5.11 There is no requirement in United States law that the testimony of an eye witness identifying the accused be corroborated. However, in some courts, the judge is required to give a cautionary instruction to the jury when they are confronted with such testimony. An omission to do so is a reversible error. In others, such a caution is treated as a matter for the judge's discretion, while some jurisdictions prohibit the giving of a caution as an improper comment on evidence by the judge. The caution given relating to identification evidence is concerned not with corroboration, but with the quality of the testimony identifying the accused, in determining which the existence of corroborative evidence is a factor.

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67. By New York Criminal Procedure Law article 60.20.

68. See e.g. Meredith v. People (1963) 152 Colo. 69; Bright v. State (1942) 145 Tex. Cr. 9.

Corroboration required for conviction of certain offences

(a) Treason

5.12 By article III paragraph 3 of the United States Constitution, no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on a confession in open court. This provision is restated in most of the state constitutions.[69]

(b) Perjury

5.13 At common law, the testimony of one witness as to the falsity of the accused's statement is sufficient to sustain a conviction of perjury only if it is corroborated.[70] This rule has been restated in statutory form in some states. The corroboration must be such that the jury is satisfied beyond reasonable doubt that the testimony of the principal witness is true. On the other hand, unlike the position in England, no corroboration is required of evidence of the act of subornation on a charge of subornation of perjury.[71] There is no need for corroboration if the defendant admits the falsity of his statement.

(c) Miscellaneous offences

5.14 Various states require corroboration of the evidence of a single witness on certain specific charges.

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69. In Maine, one witness may testify to one overt act and another to a different act of the same species of treason.

70. See e.g. Weiler v. U.S. (1945) 323 U.S. 606.

71. See e.g. Stein v. U.S. 337 F.2d 14 (9th Cir. 1964). In a few states, the perjurer and the suborner are regarded as accomplices to the offence of subornation, and so the testimony of the perjurer against the suborner may not found a conviction without corroboration.

For instance, in Idaho, corroboration is necessary on a charge of forgery or false pretences. A similar rule applies to all capital offences under the General Statute of Connecticut, and to offences under election law in Kentucky. Wigmore is sceptical of the value of such provisions. He says -[72]

> "Most of these statutes have probably been based upon some single local instance of hardship, and not upon any general survey of experience in the class of crimes dealt with. They may contain suggestions worth considering, but on the whole they are likely to be of little service. A capable judiciary and an effective jury system ... are in the end the only real safeguards of an innocent man."

The Model Penal Code

5.15 The American Law Institute's Model Penal Code deals with corroboration only in so far as it relates to the specific substantive offences codified therein. Thus there is no mention, for instance, of the rule relating to accomplices, or to an accused's confession, or to the unsworn evidence of children.

(a) Sexual offences

5.16 Article 213.6(5) of the Model Penal Code provides that:

> "No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."

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72. 7 Wigmore, 4th ed. (1978), para. 2044.

By this provision, corroboration is a requirement for the felonies of rape and gross sexual imposition under article 213.1; deviate sexual intercourse by force or imposition under article 213.2; or sexual intercourse with a person less than 16 years old, the actor being at least four years older than the victim - an offence under article 213.3(1). A caution is to be given in respect of all other offences under Article 213, that is all other forms of corruption of a minor and seduction under 213.3; sexual assault under 213.4; and indecent exposure under article 213.5.

5.17 While accepting that the corroboration requirement in sexual offences had been the subject of much criticism, the drafters of the Code felt that the enactment of the requirement in this form was desirable. They considered that this provision had the advantage of greater consistency than was the case in much of the prevailing law, because it applied the corroboration requirement to all sexual felonies rather than giving the rule selective operation. Furthermore, the rules as stated in the Code would apply equally to the testimony of complainants of either gender.

5.18 The commentators identified three arguments in favour of corroboration rules applicable to sexual offences. First was the perceived problem of fabrication of charges or fantasy on the part of complainants. They did not consider that these arguments are sufficiently proven or identified particularly with sexual offences to justify the imposition of the rule. They were equally unconvinced by the argument that a court is especially morally outraged by charges of a sexual nature, and therefore may tend to be more ready to convict than they might on another charge. The commentators on the Model Penal Code did not accept that this argument was sufficiently borne out by judicial experience, and doubted whether, even in principle, it could be said to apply to sexual offences and not, for instance, to murder. However, they recommended that corroboration

rules be retained for sexual offences on the ground that in such cases where the only evidence against the defendant is that of the victim, the case is decided on a conflict of testimonies. In their view -

> "The corroboration requirement is an attempt to skew the resolution of such disputes in favour of the defendant ... [it] should not be understood as an effort to discount female testimony or as an unsympathetic understanding of the female experience of sexual aggression. It is, rather, only a particular implement of the general policy that uncertainty should be resolved in favor of the defendant ... The criminal trial is not a sporting contest in which each side is guaranteed an equal opportunity of success. It is a coercive proceeding in which the state should assume full responsibility for demonstrating a basis for punishing the individual defendant."

5.19 Article 213.6(5) makes no specific mention of what is required as corroboration. There is no provision that there must be evidence supporting every material element in the offence. The Code's commentators explained the nature of their intended requirement as follows:

> "Broadly speaking, the court should require some supporting evidence for whatever aspect of the case is most in issue. Sometimes, what is called for is not so much independent evidence of particular elements of the offense, but rather merely a basis for believing that the testimony of the complaining witness is worthy of credit and belief."

(b) Perjury

5.20 By article 241.1(6) of the Model Penal Code, no person shall be convicted of perjury where proof of the falsity of his statement rests solely upon contradiction by the testimony of a single person other than the defendant. The commentators deemed such a provision necessary because, in their view, no straightforward case of oath against oath can satisfy the general requirement of proof beyond reasonable doubt in perjury cases. The proposed provision,

unlike the prevailing law, makes no mention of a corroboration requirement, requiring only that there be something in addition to the contradictory testimony of a single witness.

(c) Other offences

5.21 Treason is not included in the American Law Institute's codification of the penal law. It must be assumed, therefore, that it was intended to be governed by the prevailing law, in which a second supporting testimony is required. In the Code's treatment of substantive offences, no other offence has a corroboration requirement attached.

SCOTLAND

6.1 Corroboration is a general requirement in criminal cases. Consequently, no defendant may be convicted on any charge solely on the uncorroborated testimony of one witness. Corroboration must be supplied of all the material facts. Thus there must be corroboration of evidence that the offence was committed as alleged in the indictment or complaint, and that it was committed by the accused.

6.2 The Scottish Law Commission recently published a Report on the Evidence of Children and Other Potentially Vulnerable Witnesses.[73] In it the Commission recommended that "in cases of child abuse and cases in which children are witnesses there should be no exception to the general rule of Scots law whereby all the material facts justifying a conviction must be proved by corroborated evidence."[74] The

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73. Scot Law Com No 125 (1990).

74. Scot Law Com No 125, p. 10.

Commission explained that -

> "... the background in Scotland is quite different [from that in England and Wales] in that Scots law imposes a general requirement of corroboration for the proof of all crimes and offences (save only a few trivial statutory offences). ... So far as we can tell from a brief survey of foreign law systems, Scotland may now be one of only a few countries which impose a general corroboration requirement for proof of crimes and offences; and accordingly it may be that this Scottish rule should be reassessed at some time to see whether its retention, as a general requirement, is justified. However, we are in no doubt that it would be unprincipled to depart from that requirement in respect only of a certain class of witness or certain classes of crime."[75]

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75. Scot Law Com No 125, para. 3.3. This view had been widely supported on consultation: ibid..

Extract from the Report dated December 1989 of the Advisory Group (Chairman: His Honour Judge Pigot QC, Common Serjeant of London) on the Admissibility of Video-recorded Evidence by Children and Other Vulnerable Witnesses in Criminal Proceedings

THE CORROBORATION WARNING

Introduction

5.17 Another legal matter which the group thought itself bound to consider is the warning which the judge must give the jury in trials for sexual offences that it is always dangerous to convict on the uncorroborated evidence of the complainant. In this chapter we consider the nature of the rule, its purpose and practical consequences. We believe that this issue is of direct relevance to the question of video-recorded evidence because we think that unless the rule is altered our proposals for facilitating the testimony of children and of other vulnerable witnesses may, at any rate in so far as sexual offences are concerned, have a much more limited effect than we intend. We therefore also set out recommendations for reform in what we recognise as a controversial area which is now being considered by the Law Commission.

...

The effects of the warning

5.23 Because the issue of corroboration has become a narrow and complicated one and because misdirections to the effect that particular pieces of evidence might be corroborative can prove fatal we think that judges must be disinclined to give such directions unless they are

absolutely convinced that their reasoning is unassailable. One result of this is that summings-up may read extremely oddly to the layman. Here a formal warning on the lines described that conviction would be 'dangerous' may sometimes be set in the context of a recapitulation of the evidence which makes it clear that on a general consideration of the case the judge takes rather a different view.

5.24 We suspect that many jurors find the whole exercise quite impenetrable. For them consideration of the probity of evidence and the reliability of witnesses is all of a piece. In looking at the case they will have already employed the knowledge suggested by their own experiences of life in assessing possible motives like sexual neurosis, jealousy, fantasy and the rest. What does the warning and the narrow corroboration requirement mean to them? Does it perhaps suggest to some that there is offical information to the effect that women who claim to have been raped and children who say they have been abused are far more likely to be untruthful than their own knowledge and experience might indicate? The rigour and particularity of the corroboration requirement and the weight of the warning certainly could seem to suggest that this is the case.

Conclusions

5.25 It can only be supposed that in court the warning is either disregarded or that it actually leads to the acquittal of defendants who, had the jury evaluated all the evidence in the usual way, would have been convicted. Clearly many of the witnesses most likely to benefit from our proposals will be the victims of sexual offences. They cannot usually be corroborated. We think that it would be questionable in principle and undesirable in practice to introduce quite radical measures for facilitating their evidence, as well as unfair to them, if, once admitted, it

were to continue to be invariably characterised as 'dangerous' by judges.

5.26 We have concluded that the elaborate technical approach to corroboration which has grown up in England and Wales over the last seventy years or so has proved confusing and counterproductive and that, at least in respect of sexual offences, it has tended to cause injustice. The warning which must be given in sexual cases seems to us to be a crude and indiscriminate measure which is particularly ill-suited to a class of offences which take place in such widely varying circumstances.

5.27 We especially question the reasons which are usually given for the warning. It is true that complainants in sexual cases, like their counterparts in other cases, do sometimes tell entirely false stories. But we know of no evidence whatever which suggests that this takes place on such a scale and in a way so calculated to successfully deceive the jury that a special measure designed to enhance the normal standard of proof is necessary. On the contrary all the evidence which we received suggests that the stress, trauma and public humiliation so often experienced by the victims of sexual offences in court, and the intimidation to which they are sometimes subjected out of court, deter many from testifying at all and certainly militate strongly against the bringing of false evidence.

5.28 In all this it must also be remembered that a crucial function of the law is the protection of the community. In recent years substantial and apparently unremitting rises in the number of sexual crimes committed against women and children have been recorded. In such a context it is clearly of the utmost importance that rules and practices which can deflect the course of justice in these cases should be abandoned. To us this seems especially relevant to a rule which is not only highly

questionable in itself but in its practical effect is arguably sexually discriminatory.

Our proposals

5.29 There are several possible approaches to reform. The Criminal Law Revision Committee's Eleventh report suggested that the jury should be warned of the 'special need for caution' rather than the 'danger' of convicting upon uncorroborated evidence, although they also suggested that as a matter of law conviction upon the uncorroborated evidence of a witness under 14 years of age should not be possible. Neither of these courses recommends itself to us. The first proposal would leave the central problem of what constitutes corroboration untouched and the second is plainly inimical to recent scientific thought and legislative developments in relation to child witnesses which we have wholly endorsed.

5.30 A more promising line was developed by the Canadian courts. For some years, perhaps beginning with the case of Warkentin (1977)[1], they showed signs of adopting a less restrictive and specific approach to what constitutes corroboration ... . Now, by an amendment to the Canadian Criminal Code and the Canada Evidence Act, the corroboration warning in cases involving sexual offences has simply been abolished.

5.31 We believe that the conclusion reached by the Canadian legislature is right in principle. Existing safeguards which apply in all criminal cases are, we think, sufficient in those which involve sexual offences. If a case depends on the evidence of a single witness and this is so unsatisfactory that the judge thinks a conviction would

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1. 2 SCR 355.

be unsafe he may remind the jury of its right to return a not guilty verdict without hearing further evidence. Additional rules which relate only to this class of cases seem to us neither necessary nor desirable.

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